Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

MIDWEST PIPE INSULATION, INC.,
Petitioner,

vs.

MINNEAPOLIS PIPEFITTERS UNION, LOCAL 539,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a labor union's use and control of market recovery program grants illegally obtained from wage deductions on publicly funded Davis-Bacon construction projects is protected by the National Labor Relations Act.

2. Whether a union's threat to withdraw a market recovery program grant otherwise protected by the National Labor Relations Act to induce a breach of contract, without other potentially prohibited conduct, is actually or arguably prohibited by 29 U.S.C. § 158(b)(4)(ii)(B) of the National Labor Relations Act.

PARTIES TO THE PROCEEDING

The parties to the proceeding are all named in the caption hereof.

CERTIFICATE OF CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner, Midwest Pipe Insulation, Inc., states that it has no parent companies or nonwholly owned subsidiaries. A publicly held corporation does not own more than ten percent (10%) of Midwest Pipe Insulation Inc.'s stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Midwest Pipe Insulation, Inc., respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Minnesota Supreme Court appears at Appendix A-21 – A-29 to the Petition and is reported at 771 N.W.2d 28. The opinion of the Minnesota Court of Appeals appears at Appendix A-8 – A-20 to the Petition and is unpublished, but may be found as 2008 WL 3897636 (Minn. App.). The original opinion of the district court appears at Appendix A-1 – A7 to the Petition and is unpublished.

JURISDICTION

The decision of the Minnesota Supreme Court was issued on August 6, 2009, and judgment was thereafter entered on September 28, 2009. The decision appears at Appendix A-40 – A-41 to the petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Question 1 involves the application of 29 U.S.C. § 157, a portion of the National Labor Relations Act, which reads:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in

> other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Question 2 involves the application of 29 U.S.C. § 158(b)(4)(ii)(B), a portion of the National Labor Relations Act, which reads:

> It shall be an unfair labor practice for a labor organization or its agents ... to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is ... forcing or requiring any person ... to cease doing business with any other person ...

Questions 1 and 2 also involve the application of 40 U.S.C. §§ 3141-48, a portion of the Davis-Bacon Act, which is reproduced at Appendix A-42 – A-48 to the petition.

STATEMENT OF THE CASE

This case raises important questions relating to the preemptive powers of the National Labor Relations Act ("NLRA"), and the ability of the courts and agencies to police and enforce the federal Davis-Bacon Act.

The facts before the Court are on an appeal from a motion on the pleadings pursuant to Minnesota Rule of Civil Procedure 12.03. Therefore, the allegations in Petitioner's challenged pleading must be accepted as true and are undisputed before the Court. *State ex rel. City of Minneapolis v. Minneapolis St. Ry. Co.*, 56 N.W.2d 564, 567 (Minn. 1952). Petitioner refers the Court to the recitation of facts succinctly detailed in Petitioner's complaint. App., *infra*, A-49 – A-57. Briefly, the most pertinent facts affecting the Court's decision to grant certiorari review relate to the Minneapolis Pipefitters Union, Local 539's ("Local 539") use and control of funds from its market recovery program ("MRP"), obtained in significant part through illegal wage deductions on federally-funded Davis-Bacon construction projects and state-funded prevailing wage projects. *Id.* at A-50 – A-51. Local 539's MRP at issue is funded entirely by union laborers through wage deductions, which are then paid into the program and thereafter distributed to union signatory contractors for the purpose of subsidizing the elevated wage costs of union labor. *Id.* Indeed, the crucial purpose of Local 539's MRP is to maintain and improve the market share of union contractors to effectively compete against contractors whose employees have chosen not to be represented by a union. *Id.*

In the instant case, Local 539 issued a market recovery grant to a mechanical contractor, MD Mechanical, Inc. ("MD"), in the amount of $80,000.00 for pipefitting work on the St. Michael-Albertville elementary school project located in Wright County, Minnesota. *Id.* After Local 539 promised the grant, on June 26, 2006, Petitioner, a non-union, woman-owned pipe insulation contractor which had

submitted the lowest bid for the work in question, entered into a contract with MD in the amount of $166,800.00 to insulate pipe on the project. *Id.* at A-51 – A-52. On July 11, 2006, MD's president contacted Petitioner and informed Kay Johnson, its recently widowed owner and office manager, that Local 539 had threatened to rescind its market recovery grant if MD continued to work with Petitioner on the project. *Id.* Petitioner had no dispute with Local 539 and was not itself subject to any communications or actions by Local 539. Accordingly, on July 11, 2006, MD terminated the contract and hired a union contractor to perform the pipe insulation work. *Id.* Local 539's conduct caused substantial financial damage to Petitioner. *Id.* at 53.

On May 10, 2007, Petitioner served its complaint against Local 539 in state district court, asserting claims of tortious interference with contract, unfair competition, and violations of the Minnesota Prevailing Wage Act, Minn. Stat. § 177.41 *et. seq.* App., *infra*, A-49 – A-57. Petitioner's state tortious interference with contract and unfair competition claims set forth in the complaint are based on Local 539's illegal use of market recovery money in violation of the federal Davis-Bacon Act and Minnesota's Prevailing Wage Act – issues which are typically outside the ambit of the National Labor Relations Board ("NLRB") and any claimed protections of the NLRA. *Id.* On May 29, 2007, Local 539 served its answer to Petitioner's complaint, and on June 20, 2007, the union filed its motion for judgment on the pleadings pursuant to Minnesota Rule of Civil Procedure 12.03. *Id.* at A-58 – A-64 In sum, Local 539 contends Petitioner's state law claims are preempted by the NLRA pursuant to this Court's

decision in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959). *Id.*

On August 23, 2007, the state district court, relying on *BE&K Const. Co. v. United Broth. of Carpenters and Joiners of America, AFL-CIO*, 90 F.3d 1318 (8th Cir. 1996), granted Local 539's motion for judgment on the pleadings, finding that Petitioner's state law tortious interference with contract and unfair competition claims were preempted by the NLRA.[1] App., *infra*, A-5 – A-7. Petitioner appealed the district court's decision to the Minnesota Court of Appeals. On August 26, 2008, the court of appeals reversed and remanded the state district court's decision, holding that, because Local 539 had not filed an unfair labor practice charge with the NLRB, state jurisdiction over MPI's tort claim was not preempted by federal labor law pursuant to this Court's holding in *Sears, Roebuck & Co. v. San Diego County Distr. Council of Carpenters*, 436 U.S. 180 (1978). App., *infra*, A-8 – A-20. On August 29, 2008, three days after the court of appeals ruling, Local 539 filed an unfair labor practice charge against Petitioner with the NLRB, alleging Petitioner's lawsuit was preempted and interfered with the union's use and control of its MRP, protected by Section 7 of the NLRA. That charge has since been dismissed based on a finding that Petitioner's filing of a state court lawsuit was not an unfair labor practice. *Id.* at A-30 – A-39.

Local 539 sought review of the Court of Appeals' decision with the Minnesota Supreme Court, which granted Local 539's petition for further review.

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[1] Petitioner's state Prevailing Wage claim had previously been voluntarily dismissed.

On August 6, 2009, relying on this Court's holding in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959) and its own decision in *Hennepin Broadcasting Assocs. v. American Fed'n of Television & Radio Artists*, 223 N.W.2d 391, 393-94 (Minn. 1974), the court determined that Local 539's threat to withdraw a market recovery grant if MD did not terminate MPI's contract was an unlawful secondary boycott prohibited by Section 8(b)(4)(ii)(B) of the NLRA. App., *infra*, A-27 – A-29. In addition, the court determined that, because of its conclusion that Local 539's actions were prohibited by the NLRA, it was irrelevant whether Local 539 violated the Davis-Bacon Act and whether that violation would take Local 539's MRP outside the protection of the NLRA. *Id.* Judgment was thereafter entered and filed on September 28, 2009. *Id.* at A-40 – A-41.

REASONS FOR GRANTING THE PETITION

This case presents questions of great importance arising out of the illegal use of union members' dues payments for the purpose of steering construction projects to union contractors. The total cost to workers and the public is enormous. More than $1 billion dollars have been collected and hundreds of millions disbursed by unions over the past decade in market recovery funds. Armand Thiebolt, *Job Targeting And Market Recovery Practices Of Construction Unions: Their Apparent And Hidden Costs*, John M. Olin Institute, George Mason University, Labor Relations and Public Policy Series No. 38, p. 68 (2008). Every court which has considered this issue agrees that such use of dues from prevailing wage projects is illegal and outside the protections of the NLRA. *See Can-Am Plumbing,*

Inc. v. NLRB, 321 F.3d 145, 152-53 (D.C. Cir. 2003); *IBEW v. Brock*, 68 F.3d 1194, 1200 (9th Cir. 1995); *In the Matter of Building and Construction Trades Union Job Targeting Programs*, WAB Case No. 90-02, 1991 WL 494718 (1991) *enf'd, Building and Const. Trades Dept. v. Reich*, 815 F. Supp. 484 (D.D.C. 1993), *aff'd.*, 40 F.3d 1275 (D.C. Cir. 1994); *IBEW Local 48 (Kingston Constructors, Inc.)*, 332 N.L.R.B. 1492, 1500-01 (2000). The Minnesota Supreme Court's erroneous finding of federal preemption creates a direct conflict with those decisions and should therefore be reviewed and set aside.

As will be shown, the law is now clear that union MRPs violate the law when they take dues from employees working on public, prevailing wage jobs. The instant matter presents the issue of whether there is any legal remedy against the use and control of such "tainted" MRPs. Without a remedy, union MRPs will be able to illegally use *public* prevailing wage monies to drive up prices and stifle competition. The decision of the Minnesota Supreme Court effectively ignores the decisions of the Circuit Courts and the NLRB, and creates an area for MRPs to break the law with impunity. This "gap in the law" allows union MRPs to use the NLRA as both a sword and shield – the use of MRPs is legally protected by the NLRA, while the decision below holds that the use of MRPs (if they are successful) is at the same time *prohibited* by the NLRA. Review of Petitioner's case would allow the Court to resolve this loophole, and provide a clear path for non-union contractors to remedy such illegal conduct and a deterrent against illegal deductions from union laborers' Davis-Bacon wages.

I. CONFLICT BETWEEN THE FEDERAL COURTS, THE DEPARTMENT OF LABOR, AND THE NLRB REGARDING MRPS CREATES A GAP IN THE LAW.

Case law since the late 1980s makes clear that Local 539's MRP deductions on federally-funded construction projects violate the Davis-Bacon Act. Although there is no dispute that the courts and agencies have jurisdiction to remedy these illegal actions, and despite the D.C. Circuit Court's request, the NLRB refuses to address the remaining issue regarding how much Davis-Bacon money may flow into a MRP before the program itself violates public policy. This conflict between the courts and the NLRB creates a disturbing scenario in which non-union contractors are left with no means to address the use and control of an illegal MRP. At the same time, unions are allowed to continuously break the law, illegally reducing members' wages on Davis-Bacon projects, manipulating Davis-Bacon wage rates, all while hiding under *Garmon* preemption.

A. Unions Violate the Law When they Use Davis-Bacon Monies to Fund MRPs.

Local 539's MRP violates the law to the extent it uses prevailing wage monies from state and federal Davis-Bacon construction projects to help fund the program. Importantly, no court or administrative decision of the NLRB has yet defined how much Davis-Bacon money may flow into an MRP before the program violates public policy. However, the D.C. Circuit Court's decision in *Can-Am Plumbing*, described in more detail *infra*, clearly indicates that

the mere presence of Davis-Bacon money in an MRP should logically destroy its protected status under the NLRA. *Can-Am Plumbing, Inc.*, 321 F.3d at 152-53. That court further reasoned that state regulation should be appropriate where a union violated the prevailing wage laws in the operation of its MRP fund. *Id.* The Minnesota Supreme Court's decision in the instant matter is in direct conflict with the D.C. Circuit Court's decision in *Can-Am Plumbing*, and other federal cases that have examined this issue.

1. The *Reich* Case: MRP Deductions Held to Violate the Davis-Bacon Act.

The operation of union MRPs is generally protected by section 7 of the NLRA, 29 U.S.C. § 157. *Manno Electric*, 321 N.L.R.B. 278 (1996). However, in 1988, the Department of Labor's Wage and Hour Division determined that market recovery deductions on federally funded construction projects violate the Davis-Bacon Act and are not permissible because the deductions are returned to or directly or indirectly benefit contractors rather than employees. *In re Building and Const. Trades Union Job Targeting Programs*, WAB Case No. 90-02, 1991 WL 494718, *3-5 (1991) *enf'd.*, *Building and Const. Trades Dept. v. Reich*, 815 F. Supp. 484 (D.D.C. 1993), *aff'd.*, 40 F.3d 1275 (D.C. Cir. 1994). After the union's request for reconsideration, the U.S. Department of Labor Wage and Hour Administrator clarified that MRPs violate the Davis-Bacon Act even if they are financed by direct payments from employees rather than through payroll deductions because, as long as the payments are attributable to wages paid on a Davis-

Bacon project, they constitute a "subsequent deduction or rebate" prohibited by the Davis-Bacon Act. *Id.*

On appeal, the Wage Appeals Board affirmed the determination of the Administrator and held as follows:

> [The union's MRP] violates the Davis-Bacon prevailing wage rate requirements and the regulations contained at 29 C.F.R. 3.5. The Board also notes that the job targeting programs, generally, violate the public policy embodied in the Davis-Bacon Act. If funds were deducted from Davis-Bacon projects for use as subsidies on private sector projects, the prevailing wage surveys would be distorted to the extent the subsidy was distributed to any contractor on a private section project. That subsidy would be non-public, unlike a project agreement, and would not affect future prevailing area wage determinations. Over time, the government would pay more on Davis-Bacon and Related Act projects than the actual area wage rate, a result clearly outside the public interest and definitely not contemplated by the Congress which enacted Davis-Bacon.

Id. at. *6.

The union and allied organizations again sought review of the decision in District Court for the District of Columbia. The district court upheld the

Department of Labor's statutory interpretation as consistent with the purpose of the Davis-Bacon Act, which is to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area. *Building and Const. Trades Dept. v. Reich*, 815 F. Supp. 484 (D.D.C. 1993). On appeal, the D.C. Circuit Court of Appeals affirmed as follows:

> Collect[ing] wages from employees in order to pay contractors in exchange for continued or increased employment is inconsistent with the purpose of the Davis-Bacon Act, which is to prevent contractors using cheap labor from unfairly winning contracts by underbidding their local competitors.

Reich, 40 F.3d at 1279. The Court went on:

> Beyond the inconsistency of the [MRP] deductions with the literal language of 40 U.S.C. § 276 a(a)[2], [the DOL's] interpretation of the Act as precluding those deductions furthers the goals of the legislation. [Market recovery] deductions from wages of mechanics and laborers on Davis-Bacon projects have the effect of artificially increasing the prevailing local rate wage, which must be met by non-union employers, by the inclusion in the local average of pre-deduction wages paid by the unionized employers before the deduction. The

[2] Effective September 27, 2006, the Davis-Bacon Act was renumbered from 40 U.S.C. §§ 276a to 276a-s, to 40 U.S.C. §§ 3141 to 3148.

> union employees then suffer a reduction in their wages (potentially, though not always, below the prevailing wages) through deductions precluded by the language of the Act. Further, the [MRP] funding scheme creates a second opportunity for doing violence to the goals of the Act when the targeted programs drawing on the fund are also Davis-Bacon projects in that the employers on the recipient project are paying their employees in part with a subsidy derived from deductions taken from other Davis-Bacon employees.

Id. 1280. Thus, since 1994 it has been illegal for union MRPs to be funded by Davis-Bacon monies.

2. The *Brock* Case: Davis-Bacon Prevents Unions from Using Dues Collected from Wages on Davis-Bacon Projects To Benefit *Any* Contractor.

In 1995, the Ninth Circuit Court of Appeals addressed the scope of the *Reich* decision. In *IBEW v. Brock*, a group of unionized employees employed on a federal construction project in Nevada refused to pay market recovery deductions as the union required, asserting that they were not lawful dues under Department of Labor regulations. *Brock*, 68 F.3d at 1200. The local union fined the employees for the amount of the unpaid deductions and suspended them from the union. *Id.* The employees brought an action in Nevada U.S. District Court, which ruled in the union's favor. The employees appealed to the Ninth Circuit Court of Appeals, which overturned the

district court ruling and determined that, even though the funds to support the union's MRP were not paid directly from the employees' paychecks, the union's MRP still violated the Davis-Bacon Act. *Id.* In so holding, the Ninth Circuit concurred with the D.C. Circuit Court and determined that the MRP was antithetical to the purposes of Davis-Bacon, which were to limit occasions in which part of employees' wages could be returned to contractors and to prohibit the use of deductions from employees' pay to benefit employers. *Id.* at 1200-01. Additionally, the Ninth Circuit held that the Davis-Bacon Act prevents unions from using dues collected from wages on Davis-Bacon Projects to benefit *any* contractor, not just the specific contractor from whom the wage rebate was derived. *Id.* at 1201.

3. The *Kingston* Case: The NLRB Defers Responsibility for Enforcement of the Davis-Bacon Act to the Labor Department and the Courts.

In 2000, the NLRB itself took up the issue of whether a union violated the NLRA by threatening to fire employees for not making MRP payments out of wages earned on Davis-Bacon projects. *IBEW Local 48 (Kingston Constructors, Inc.)*, 332 N.L.R.B. 1492 (2000). In order to determine whether the union committed an unfair labor practice, the Board was forced to determine whether collecting dues on Davis-Bacon projects was itself legal. *Id.* Although the Board reaffirmed the general rule that MRPs are protected under the NLRA by *Manno Electric*, the Board further held, in light of prior decisions by the Department of Labor and the federal courts, that the collection of dues for MRPs on Davis-Bacon Projects

or the direct payment of dues from work on such projects violates the Davis-Bacon Act. *Id.* at 1500-01. In so holding the Board commented:

> [w]e agree with the General Counsel that, in light of the decisions of the Labor Department and the courts of appeals, requiring the payment of MRP dues as a condition of employment on Davis-Bacon projects is inimical to public policy ... The Labor Department and the courts, not the Board, have the responsibility to enforce the Davis-Bacon Act. They have concluded that the collection of dues for job targeting programs on Davis-Bacon projects violates the Davis-Bacon Act. Moreover, the Labor Department has indicated, and the Ninth Circuit has expressly held, that even the direct payment of dues for such programs, as opposed to deductions pursuant to checkoff, is unlawful under Davis-Bacon. As a matter of comity we shall defer to those rulings.

Id. The Board went on to discuss its jurisdiction to remedy Davis-Bacon violations. The Board reasoned that "the Labor Department and the courts, *not the Board*, have the responsibility to enforce the Davis-Bacon Act." *Id.* (emphasis added). The Board concluded that:

> [b]oth the Labor Department and the courts have definitively construed those provisions as prohibiting the collection of such dues on Davis-Bacon projects.

> The Board has no expertise and no authority on which to base a contrary finding. We therefore are no freer to disregard those rulings than we would be to disregard the language of Davis-Bacon itself, had that language contained the same express prohibition ... [W]e cannot simply hold, as the Union ... apparently would have us do, that because the collection of [MRP]dues on Davis-Bacon jobs would otherwise be lawful under the NLRA, any ruling by other agencies or courts that the same conduct violates Davis-Bacon must be preempted as inconsistent with the Act. Were we to do so, we would be announcing, in effect, that the NLRA trumps all other Federal statutes.

Id. The 2000 language above is the final word on the subject from the Board. The collection of dues for MRPs on Davis-Bacon Projects or the direct payment of dues from work on such projects is illegal, and enforcement of this law is not preempted by federal labor law.

4. The *Can-Am Plumbing* Case: The U.S. Court of Appeals Holds that Actions Based on Illegal Use of Market Recovery Monies is Not Preempted.

The D.C. Circuit's holding in *Can-Am Plumbing*, is the most relevant authority in this matter. In *Can-Am Plumbing*, a contractor filed a complaint in state court alleging violations of

California laws regarding unfair trade practices, prevailing wage levels and employer kickbacks from employees. *Can-Am Plumbing*, 321 F.3d at 147. The contractor claimed that its union competitor had underbid it on a private construction project as the result of an unlawful MRP. *Id.*. The MRP was supported, in part, by federal Davis-Bacon and state prevailing wage monies. *Id.* at 148. The union filed a charge with the NLRB alleging that the contractor had violated the NLRA by filing a preempted lawsuit. *Id.* Despite the presence of state and federal prevailing wage monies in the MRP, the Board held for the union, and found a violation of section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1). *Id.* In so holding, the Board found *Kingston* inapplicable because the project at issue in the case was not a Davis-Bacon project and the amount of dues unlawfully withheld by the union was *de minimis*. *Id.*

The contractor appealed, and the U.S. Court of Appeals for the D.C. Circuit reversed and remanded the case back for additional findings. *Id.* at 147. The court noted that the presence of Davis-Bacon monies in the MRP fund should logically destroy its protected status under the NLRA and held as follows:

> [w]hile the Board...did not treat the existence of [Davis-Bacon] moneys in the [MRP] as wholly irrelevant, neither did it explain why the Davis-Bacon moneys did not affect the [MRP's] legality or why the Union's conduct in that regard was excusable. No court or administrative decision of the Board has yet defined precisely how much Davis-Bacon money may flow into a [MRP] before the program violates public

> policy. In the circumstances of this case, the Board's conclusory determination that these moneys did not taint the [MRP] is inadequate to support its finding that the operation of the Union's [MRP] was clearly protected conduct.

Id. at 153. In addition, the court reminded the NLRB of its obligation to defer to other tribunals where its jurisdiction under the NLRA interferes with rights under a statute with which it has no expertise, such as the Davis-Bacon Act. *Id.* Finally, the court commented that the NLRB's decision was troubling "in light of the fact that Can-Am is left with no available means to redress its prevailing wage law grievances if its lawsuit ... is preempted." *Id.* at 154. In effect, the court held that the union's actions were not protected by federal labor law, but invited the NLRB to articulate whether a *de minimis* rule existed in this area. On remand, the NLRB declined to address the substance of the case.[3] Thus, the most recent judicial pronouncement on this issue indicates that state jurisdiction and regulation is appropriate where a union has violated the Davis-Bacon Act or state prevailing wage laws in the operation of its MRP fund.

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[3] On remand, the Board found that the contractor failed to assert that the MRPs inclusion of dues derived from wages on state or federal projects violated the Davis-Bacon Act or undermined the protected status of the MRP as a whole under the NLRA. *Can-Am Plumbing, Inc.*, Case No. 32-CA-16097, 350 N.L.R.B. No. 75 (August 24, 2007). Because the issue had allegedly not been raised previously, the Board held the issue had been waived and therefore would not be considered. *Id.*

5. The NLRB's December 31, 2007 Office of Advice Letter: MRPs Which Include Dues Derived from Wages on Davis-Bacon Projects are Not Protected by the NLRA.

On December 31, 2007, the NLRB's Office of Advice issued an advisory letter on this very issue. The plaintiff in the underlying lawsuit had brought an action for tortious interference with contract based on a union's MRP fund. The district court dismissed the action as preempted. In a subsequent unfair labor practice proceeding, the NLRB's Associate General Counsel issued the following opinion:

> Preemption ... is not implicated in this case because the MRP that the lawsuit is attacking, which includes dues derived from wages on Davis-Bacon projects, *is not actually protected under the [NLRA]*. The Board has not decided whether the inclusion of dues from Davis-Bacon projects in a job targeting program, like the MRP here, renders the entire program unprotected by the [NLRA]. When the D.C. Circuit remanded the proceeding in Can-Am Plumbing to the Board for consideration of that issue, the Board determined that the issue of whether the job targeting program in that case violated the Davis-Bacon Act had not been raised by the respondent, and therefore it specifically refused to consider the issue. *Because the issue of whether the inclusion of any contributions from wages earned on*

> *Davis-Bacon projects can ever be protected by the [NLRA] is unsettled, there is no basis for concluding the activity at issue here to be "actually" preempted.*

D.F.M. Industries, 2007 W.L. 5156981, *4 (NLRBGC 2007) (emphasis added). The Associate General Counsel stated that, "in light of the [e]mployers' non-frivolous arguments, some of which are supported by federal case law, we conclude that the [e]mployers' state law claims were reasonably based." *Id.* at *5.

The courts and the NLRB concur that the collection of dues from wages earned on projects covered under the Davis-Bacon Act is illegal and therefore unprotected by the federal labor laws. MPI's tortious interference and unfair competition claims at issue are based on the illegal funds and the use and control of those funds by Local 539's MRP. App., *infra*, A-49 – A-57. Just as the collection of such funds is illegal and unprotected by federal labor laws, the use of such tainted money to wrongfully induce a breach of contract should also be held to be outside the protection of Section 7 of the NLRA. The U.S. Court of Appeals for the D.C. Circuit clearly agrees with this analysis, but the NLRB has refused to discharge its responsibility to decide the issue. This gap in the law, acknowledged by the NLRB's Office of Advice, creates a troubling scenario whereby labor unions' illegal conduct is actually protected from state court relief under *Garmon* preemption. At the same time there is no available remedy for conduct which everyone agrees is illegal.

II. THE DECISION BY THE MINNESOTA SUPREME COURT CANNOT BE RECONCILED WITH THE FOREGOING PRECEDENT, AND DEMONSTRATES A GAP IN THE LAW.

The decision of the Minnesota Supreme Court is in error because it ignored the foregoing precedent, and thus highlights a gap in the law. In addition, the court erroneously relied on a non-binding Advice Memorandum issued by the NRLB's Associate General Counsel and ignored significant labor law preemption analysis determined by the NLRB and the courts, resulting in the displacement of deeply-rooted state court remedies not supported by any accurate federal preemption analysis.[4]

If Local 539's actions were either clearly or arguably protected by Section 7 of the NLRA, or clearly or arguably prohibited by Section 8 of the NLRA, the state courts would not have jurisdiction over Petitioner's claims. *Garmon*, 359 U.S. at 244. The Minnesota Supreme Court reasoned that because it found Local 539's actions to be prohibited by Section 8, it would be irrelevant, in its view, whether

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[4] Minnesota's own Prevailing Wage Statute, or "Little Davis-Bacon Act," has a deeply rooted, long-standing history. *See* Minn. § 177.41 *et. seq*. The State's local interest in competitive bidding, especially in public construction, the protection of lawful contracts from tortious interference and the integrity of state prevailing wage surveys and avoidance of MRP deductions for state prevailing wages is indisputable. The federal interest in preserving the integrity of the Davis-Bacon wage survey process and preventing improper rebates from Davis-Bacon wages runs parallel to these state interests and both together overcome any claim of NLRA preemption of Petitioner's causes of action.

Local 539 violated the Davis-Bacon Act, and whether this violation would take Local 539's MRP outside of Section 7 protection. App., *infra*, A-27 – A-29. This analysis is mistaken.

The court's holding and analysis ignores the primary purpose of union MRPs – to obtain jobs for union contractors to the detriment of non-union contractors and their employees. Stated differently, the very purpose of the MRP is to eliminate non-union competition. Section 8(b)(4) of the NLRA makes it an unfair labor practice to "threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce ... where ... an object thereof ... is forcing or requiring any person to cease ... doing business with any other person." 29 U.S.C. § 158(b)(4)(ii)(B). Whether admitted or not, the open secret in the construction industry is that the goal of any MRP is not only to win bids for union contractors, but to eliminate non-union competition. Labor unions have spent over $1 billion dollars to make sure this happens. Thiebolt, *supra* p. 6, at 68. Generally, this conduct is protected under Section 7 of the NLRA pursuant to the NLRB's decision in *Manno Electric*. Nevertheless, Local 539's conduct cannot be simultaneously protected under Section 7 and prohibited under Section 8(b)(4) of the NRLA. Contrary to the court's decision, this is exactly why the issue of whether Local 539 violated the Davis-Bacon Act *is* relevant. If illegal Davis-Bacon money is present, and the mere presence of that money destroys the MRP's protected status, then Local 539's MRP is outside the ambit of the NLRA as a matter of federal law, and the state courts have clear jurisdiction, without ever reaching the analysis of state versus federal law interests in NLRA

preemption jurisprudence. *See Kingston*, 332 N.L.R.B. at 1500-01 and *Can-Am Plumbing*, 321 F.3d at 153-54. Consequently, the critical issue to be determined is how much Davis-Bacon money may flow into a MRP before any alleged *de minimis* exception is exceeded and the program itself violates the law. This is the question which has gone unanswered since the D.C. Circuit's opinion in *Can-Am Plumbing*. The Minnesota Supreme Court erroneously believed this issue to be irrelevant.

In addition, the court erroneously relied on the NLRB's Advice Memorandum, issued on January 30, 2009, in response to Local 539's unfair labor practice charge against Petitioner. App., *infra*, A-28; A-30 – A-39. Three days after the Minnesota Court of Appeals reversed and remanded the district court's decision to dismiss Petitioner's case as preempted, Local 539 brought an unfair labor practice charge against Petitioner contending that Petitioner's state court lawsuit challenging the union's MRP unlawfully interfered with the union's Section 7 rights. *Id.* at A-28. In response, the NLRB's Office of General Counsel issued a purely advisory, non-binding Advice Memorandum ("Recommendation") which recommended that Local 539's conduct in relation to Petitioner was prohibited by the NLRA because it violated Section 8(b)(4)(ii)(B). *Id.* at A-31; A-34 – A-37. Importantly, the NLRB has never ruled on this issue. The internal Recommendation further submitted that Local 539's unfair labor practice charge should be dismissed, reasoning "although the lawsuit's focus on conduct actually prohibited by the [NRLA] renders it preempted under *Garmon*, a preempted lawsuit that does not restrain or coerce employees in the exercise of their Section 7 rights

does not constitute an unfair labor practice." *Id.* at A-36 – A-37.

The court below erroneously relied on the Recommendation. First, the Recommendation is not binding authority. The memorandum was not issued by the NLRB, but was rather a non-binding internal recommendation issued by the NLRB's Associate General Counsel in the context of a decision whether to exercise prosecutorial discretion. *Id.* at A-30 – A-31. Second, the Recommendation misstated, or at the very minimum, confused the law. Although the Recommendation acknowledges that the collection of dues on Davis-Bacon prevailing wage projects violates the law, the Recommendation clearly implies that the NLRB's 2001 decision in *Can-Am Plumbing* "reconciles" the Board's prior decisions in *Manno Electric* and *Kingston*, stating: "the [NLRB] held that a job targeting program where "at most only 2 to 3 percent of the funds ... came from Federal or state prevailing wage jobs" constituted protected activity." *Id.* at A-38. This misguided conclusion completely ignores the D.C. Circuit's decision in *Can-Am Plumbing*, which called the NLRB's logic on this issue into question. *See Can-Am Plumbing*, 321 F.3d at 153-54. Third, the Recommendation made an inappropriate factual determination that Local 539 does not provide money to contractors working on publicly funded projects covered by Davis-Bacon or state prevailing wage statutes. App., *infra*, A-39. This is contrary to the undisputed facts in Petitioner's complaint, which must be accepted as true in a motion for judgment on the pleadings. *Id.* at A-51. Any reliance on this Recommendation is erroneous given the foregoing analysis.

The court below also erroneously based it's holding on that court's prior decision in *Hennepin Broadcasting*. *Id.* at A-27 – A-29. In *Hennepin Broadcasting*, the court dismissed the plaintiff's state tortious interference claims because they were based on ordinary labor dispute activities specifically regulated by federal labor law. *Hennepin Broadcasting*, 223 N.W.2d at 393-94. The instant matter relates to an illegal MRP, in the context of a pure interference with contract theory, without any of the *indicia* of a labor dispute between Petitioner and Local 539. *Hennepin Broadcasting* is not analogous to Petitioner's case, and the court's holding relying upon it was therefore in error.

Finally, the Minnesota Supreme Court's decision is erroneous because it ignored the NLRB's preemption analysis under *Loehmann's Plaza*. Pursuant to *Loehmann's Plaza*, when arguably protected activity is alleged, preemption does not occur in the absence of "Board involvement." *Loehmann's Plaza*, 305 N.L.R.B. 663, 668 (1991). Upon the Board's involvement, a lawsuit directed at arguably protected activity is preempted by federal labor law. *Id.* Pursuant to the NLRB, "Board involvement" only occurs when the General Counsel issues a complaint alleging that the lawsuit in question constitutes unlawful interference with protected activity. *Id.* at 670-71. It is undisputed that the NLRB did not issue a complaint in Petitioner's case.[5] In fact, the unfair labor practice charge was dismissed. App., *infra*, A-30 – A-39. Consequently, even if the unlawful activity in this case were arguably protected by the NLRA, which is

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[5] As noted in the prior paragraph, Petitioner disputes whether any arguably protected conduct occurred.

not the case, preemption cannot occur because there is no current "Board involvement" pursuant to *Loehmann's Plaza*.

The Court should not allow an erroneous decision on this federal preemption issue to stand, and should grant Petitioner's writ accordingly.

III. THE ISSUE PRESENTED IS OF GREAT PRACTICAL AND LEGAL IMPORTANCE.

The conflict or gap in the law addressed in this case is of great practical importance because of its sweeping national implications. Non-union contractors and their employees are now at risk, more than ever, of losing work on construction projects as a direct consequence of labor unions' use and control of illegal MRPs funded by Davis-Bacon money. [6] It is undeniable that this Nation has had a long tradition of regulation and scrutiny of union funds, because of a well-documented history of corruption and abuse. *See* Michael J. Nelson, *Slowing Union Corruption: Reforming the Landrum-Griffen Act To Better Combat Union Embezzlement*, 8 Geo. Mason L. Rev. 527, 528-42 (2000). Allowing Local 539, or any other union, to blithely break the law and use monies illegally

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[6] The American Recovery and Reinvestment Act of 2009 ("ARRA") appropriated $130 billion dollars for the construction industry for the purpose of stimulating the economy and improving the Nation's infrastructure. American Recovery and Reinvestment Act of 2009, Pub.L.No. 11-5 § 1606 (2009). In the wake of ARRA, federal taxpayer dollars are being funneled into these construction projects that are subject to the requirements of the federal Davis-Bacon Act and/or individual state prevailing wage laws. *Id.* Consequently, thousands of non-union contractors will be affected by labor unions' use of illegal MRPs.

deducted from their members' wages to interfere with contracts and defeat open bid competition, but nevertheless claim absolute immunity from legal scrutiny, flys in the face of this tradition. If the collection of dues on a Davis-Bacon project to fund a MRP is illegal and outside the protection of federal labor laws, then the subsequent use and control of that tainted money, particularly since such MRP funds now total over $1 billion dollars, should also be illegal. Armand Thiebolt, *supra* p. 6, at 68. As a matter of public policy and practical public importance the Court should grant the petition to review this issue.

As this Court determined in *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942), the Court has an obligation to undertake a careful balancing of the policies of the NLRA when it conflicts with another federal statute. The Minnesota Supreme Court failed to engage in this careful balancing of the policies. Common sense dictates that the operation of a MRP cannot be both protected by Section 7 of the NLRA and simultaneously prohibited by Section 8 of the NLRA in the absence of any underlying labor dispute. The Minnesota Supreme Court mistakenly abbreviated its own jurisdiction by treating unpreempted state claims as preempted. If its erroneous federal preemption analysis stands, labor unions will be able to continue to unfairly compete against non-union contractors and their employees with the use of wage deductions taken illegally from their own members on Davis-Bacon projects without fear of redress.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Midwest Pipe Insulation, Inc., d/b/a MPI, Inc.,

Plaintiff,

ORDER AND MEMORANDUM GRANTING DEFENDANT PIPEFITTERS LOCAL UNION 539'S MOTION FOR JUDGMENT ON THE PLEADINGS

v.

File No. 27-CV-07-11647

MD Mechanical, Inc., a Minnesota corporation, and Minneapolis Pipefitters Union, Local 539,

Defendants.

The above-entitled matter came on before the undersigned Judge of District Court on August 8, 2007, on the motion of Minneapolis Pipefitters Union, Local 539 (Local 539) for judgment on the pleadings.

Michael McCain, Esq., appeared on behalf of the plaintiff.

Brendan Cummins, Esq., and Danielle LeClair, Esq., appeared on behalf of Defendant Minneapolis Pipefitters Union, Local 539.

Based upon the files, records and proceedings herein, including the arguments of counsel, the Court makes the following **ORDER:**

1. Defendant Local 539's motion for judgment on the pleadings is in all respects **GRANTED.**

2. The attached memorandum is incorporated herein as if set forth in full.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: 8/23/2007 BY THE COURT:

s/ John Q. McShane
John Q. McShane
Judge of District Court

MEMORANDUM

The above-entitled matter came on before the undersigned Judge of District Court on the motion of Defendant Minneapolis Pipefitters Union, Local 539 (Local 539) for judgment on the pleadings.

I. Legal Standard

A motion to dismiss or for judgment on the pleadings will be granted if it is not "possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." N. States Power Co. v. Minn. Metro. Council, 684 N.W.2d 485 (Minn. 2004); Noske v. Friedberg, 670 N.W.2d 740 (Minn. 2003). Such a motion must be denied if the plaintiff has alleged sufficient facts to state a claim; the required showing is a minimal one. Id. Allegations of a complaint must be accepted, as true and viewed in the light most favorable to the plaintiff. In re Milk Indirect Purchaser Antitrust Litigation, 588 N.W.2d 772 (Minn. Ct. App. 1999). The Court may grant a motion to dismiss on the basis of a dispositive issue of law. Neitzke v. Williams, 490 U.S. 319, 109 S. Ct. 1827 (1989).

II. Facts

The following facts are taken from the plaintiff's Complaint. Plaintiff Midwest Pipe Insulation, Inc. d/b/a MPI, Inc., (MPI) is a Minnesota corporation with its principal place of business in Baxter, Minnesota. MPI is a non-union, merit shop employer in the business of pipe, boiler and duct work throughout the state of Minnesota. Defendant MD Mechanical, Inc. (MD) is a Minnesota corporation with its principal place of business in St. Cloud, Minnesota. MD is primarily engaged in the business of plumbing work. Defendant Local 539 is a labor organization with its principal place of business in Minneapolis, Minnesota.

On or about June 20, 2006, MD entered into a contract with Donlar Construction Company to perform certain labor and furnish certain materials, including the installation, alteration and/or repair of a pipefitting system in the St. Michael-Albertville Elementary School Construction Project. On or about June 26, 2006, MD accepted MPI's bid to furnish and provide certain labor on the project. MPI was to be paid $166,800 for the performance of this subcontract. On or about July 11, 2006, MPI learned that MD was being pressured by Local 539 to breach its subcontract agreement with MPI. Specifically, Local 539 threatened to rescind it's promised "target money" if MPI's non-union laborers were used to perform the subcontract work on the project. As a result of Local 539's threats, MD sent a letter to MPI terminating the June 20, 2006, executed written subcontract agreement.

Local 539 provides and/or has provided MD, in the past, with target money from the Union's market recovery program. A market recovery program is

designed to maintain and/or improve the market share of unionized contractors by subsidizing the wage costs of union employers who bid on certain projects and/or to induce non-union contractors to become union contractors by subsidizing higher wage costs associated with union laborers. Target money is funded entirely by union employees' wage deductions.

Initially, MPI brought suit against MD and Local 539. In Count One of that Complaint, MPI alleged that Local 539 interfered with MPI's contractual relationship with MD. Specifically, it is alleged that Local 539 induced MD to breach its obligation with MPI to the benefit of and in favor of Local 539. This, MPI alleges, interfered with MPI's contractual relationship and/or prospective business advantage. In Count Two, MPI alleges a violation of the Minnesota Prevailing Wage Act, Minn. Stat. § 177.41 et. seq. MPI alleges that Local 539 promise and/or providing "target money" to MD violates the Minnesota Prevailing Wage Act to the extent that the "target money" was funded in whole or in part by deductions from employees' wages on past and/or present Minnesota Prevailing Wage Act construction projects. In Count Three, MPI alleges Unfair Competition. Specifically, MPI alleges that MD and Local 539 have caused or will cause MPI severe and serious injury, both by advantage in the marketplace (sic) and potential damage to MPI's goodwill and reputation.

Subsequent to its initial filing, Plaintiff voluntarily dismissed its claim against MD and Count Two, the Prevailing Wage Act Claim. In addition, all parties agree that Count Three, the Unfair Competition Claim, duplicates the tortuous interference claim in Count One.

III. Analysis

The basis of Plaintiff's claim in this case is set forth at page six of its Memorandum in Opposition to Defendant's Motion for Judgment on the Pleadings. **"DEFENDANT'S MRP GRANT TO MD IS ILLEGAL TO THE EXTENT SUCH FUNDS WERE COLLECTED ON DAVIS-BACON AND/OR MINNESOTA PREVAILING WAGE CONSTRUCTION PROJECTS."** This is the issue that Plaintiff wants to argue. This is the issue to which Plaintiff devotes all of its time and effort even though the Prevailing Wage Act count of the Complaint was dismissed.

The only issue before the Court is Plaintiff's claim for tortious interference with contract. On facts remarkably similar to those before this Court, the Eighth Circuit Court of Appeals found this issue to be pre-empted by federal labor law. BE&K Const. Co. v. United Broth. of Carpenters and Joiners of America, AFL-CIO, 90 F.3d, 1318 (8th Cir. 1996). In BE&K, a non-union construction contractor's contract with his employer was terminated by the employer after union representatives asked the employer to reconsider the contract. Plaintiff alleged an unlawful secondary boycott in violation of the Labor Management Relations Act and a tortious interference with its contractual relationship and business expectancy. After a verdict for the plaintiff, the Eighth Circuit ruled, inter alia, that plaintiff's state law tortious claim was pre-empted by federal labor law.

> As a general rule, federal labor law preempts similar or contradictory state laws. (Citations omitted.) Congress has crafted a comprehensive statutory framework that reflects its determination

> that a uniform law of labor relations serves an important federal interest....Any state regulation, that conflicts with or frustrates the purpose of this federal policy must yield to it....This includes state tort claims brought against parties to labor disputes.
>
> Section 303 of the LMRA regulates union secondary activities and strikes a balance between the interest of employers in prohibiting secondary interference and a union's interest in free expression and its rights to engage in protected conduct. This statute makes it unlawful for a labor organization to use threats or coercion to force a neutral employer (such as Potlatch) to cease doing business with a primary employer (such as BE&K), but it does not prohibit the use of persuasion to achieve the same end. 29 U.S.C. § 187; 29 U.S.C. § 158 (b)(4)(ii). It creates a private right of action against labor unions for damages, and limits recovery in such cases to actual, compensatory damages. 29 U.S.C. § 187. When Congress enacted section 303 it occupied the field of regulation of secondary activities and closed it to state regulation. (Citation omitted.)

Id. at 1327.

In its brief, Plaintiff notes that under Minnesota law the tort of interference with contract requires a plaintiff to prove: (1) the existence of a contract; (2) the defendant's knowledge of such contract; (3) the intentional procurement of its breach; (4) without justification; and (5) damages.

Plaintiff contends that the use of an MRP grant that was made up from funds collected on Davis-Bacon and/or Minnesota Prevailing Wage construction projects rests squarely with the fourth element — justification, However, as was noted earlier, a state law claim of tortious interference is pre-empted by federal labor law. The issue of the means used is never reached.

For these reasons Defendant Local 539's motion to dismiss and/or for judgment on the pleadings must be granted.

s/ John Q. McShane

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2006).

STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1706

Midwest Pipe Insulation, Inc., d/b/a MPI, Inc.,
Appellant,

vs.

MD Mechanical, Inc.,
Defendant,

Minneapolis Pipefitters Union, Local 539,
Respondent.

Filed August 26, 2008
Reversed and remanded
Shumaker, Judge

Hennepin County District Court
File No. 27-CV-07-11647

Douglas P. Seaton, Alec J. Beck, Michael L. McCain, Seaton, Beck & Peters, P.A., 7300 Metro Boulevard, Suite 500, Minneapolis, MN 55439 (for appellant)

Brendan D. Cummins, Nicole M. Blissenbach, Danielle LeClair, Miller-O'Brien-Cummins, P.L.L.P., One Financial Plaza, 120 South Sixth Street, Suite 2400, Minneapolis, MN 55402 (for respondent)

Considered and decided by Schellhas, Presiding Judge; Shumaker, Judge; and Hudson, Judge.

UNPUBLISHED OPINION

SHUMAKER, Judge

Appellant non-union contractor challenges the district court's entry of judgment on the pleadings in favor of respondent union. The district court determined that appellant's claims are preempted by federal labor law. Because appellant's complaint is based primarily on alleged violations of federal and state prevailing wage statutes, the interpretation of which does not require invoking federal labor law, federal preemption does not apply to preclude the state court's jurisdiction over this matter. We reverse and remand.

FACTS

Appellant Midwest Pipe Insulation, Inc. (MPI) is a non-union employer that performs pipe, boiler, and duct work in Minnesota. In June 2006, MPI submitted a bid to perform plumbing, pipe and duct insulation for MD Mechanical, Inc. (MD), a Minnesota business hired to perform pipefitting work on a school construction project. MD accepted MPI's bid and both parties executed a subcontract agreement.

MPI alleges that on July 11, 2006, MD informed MPI that respondent Minneapolis Pipefitters Union, Local 539 was pressuring MD to breach its subcontract agreement with MPI. Local 539 had previously granted MD $80,000 from the union's market recovery program (MRP). An MRP is a job-targeting program designed to subsidize wage costs of contractors who employ union members on certain projects, and is funded entirely through union employees' wage deductions. One condition of

eligibility for MRP grant money is that the contractor must agree to hire union employees to perform the targeted work on the project. According to MPI, Local 539 threatened to rescind its MRP grant if MD used MPI's non-union employees to perform the pipe insulation work on the school construction project.

That same day, MD terminated its subcontract agreement with MPI.

MPI brought suit against both Local 539 and MD, asserting claims of tortuous interference with contract and unfair competition. MPI also asserted that Local 539 violated the Minnesota Prevailing Wage Act (MPWA), Minn. Stat. §§ 177.41, .44 (2006), and the Davis-Bacon Act, 40 U.S.C. §§ 3141-3148 (2006).[1] The MPWA requires as a matter of state policy that contractors on state-funded projects pay laborers wages no less than the prevailing wage for similar work in the greater community. Minn. Stat. §§ 177.41, .43. The MPWA was modeled after the federal Davis-Bacon Act, which requires that workers on certain federally funded projects receive the prevailing wage as determined by the Secretary of Labor "without subsequent reduction or rebate." 40 U.S.C. § 3142(a)-(c); *see also Dicks v. Minn. Dep't of Admin.*, 627 N.W.2d 334, 337 (Minn. App. 2001) (reviewing legislative history of MPWA and its federal counterpart), *review denied* (Minn. July 24, 2001). According to MPI's complaint, the MRP grant money used here was "funded, in whole or part, by deductions from employees' wages on past and/or present" state and federally funded construction

[1] Formerly cited as 40 U.S.C. §§ 276a to 276a-5, the current renumbered version of the Davis-Bacon Act became effective September 27, 2006.

projects, and its use as a wage subsidy for contractors hiring union employees "has the purpose and/or effect of artificially inflating the regional prevailing wage" on similar construction projects, which violates state and federal policy.

Local 539 moved for judgment on the pleadings under Minn. R. Civ. P. 12.03, arguing that MPI failed to state a claim upon which relief can be granted. Local 539 asserted that MPI's tortious-interference and unfair-competition claims "are within the exclusive jurisdiction of the National Labor Relations Board and must be dismissed as preempted by federal labor law." Local 539 further asserted that MPI's claim under the MPWA fails because MPI "does not allege any amount of money that any employee was purportedly underpaid and, in any event, the [MPWA] did not apply to the construction project at issue."

In its response, MPI dismissed MD as a party to the suit, and dismissed its claim that Local 539 violated the MPWA. MPI also admitted that the school construction project was not subject to prevailing wage requirements under either state or federal law. Nevertheless, MPI argued that its surviving tortuous-interference and unfair-competition "claims are *directly premised* on Local 539's MRP grant tainted with fraudulent and illegal funds" collected on past state or federal prevailing wage construction projects.

The district court granted Local 539's motion for judgment on the pleadings, concluding that MPI's claim of tortious interference with contract[2] was

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[2] Because success on a claim of unfair competition requires establishing a claim of tortious interference with contract,

preempted by federal labor law. While the district court acknowledged MPI's allegation that the MRP grant was in fact illegally funded and therefore could not justify Local 539's intentional procurement of the contract's breach, the court did not reach the merits of the tortious-interference claim.

Judgment was entered, and this appeal by MPI follows.

DECISION

In reviewing an appeal from a case dismissed on the pleadings, the only question before this court is whether the complaint sets forth a legally sufficient claim for relief. *In re Trusts by Hormel*, 543 N.W.2d 668, 671 (Minn. App. 1996) (citing *Elzie v. Comm'r of Pub. Safety*, 298 N.W.2d 29, 32 (Minn. 1980)). This question of law is subject to de novo review. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). This court will "consider only the facts alleged in the complaint, accepting those facts as true" and will "construe all reasonable inferences in favor of the nonmoving party." *Id.* "It is immaterial to our consideration here whether or not the plaintiff can prove the facts alleged." *Elzie*, 298 N.W.2d at 32 (quotation omitted).

In its complaint, MPI alleges that Local 539 tortiously interfered with MPI's subcontract with MD. In order to establish a claim of tortious interference with contract, a plaintiff must show "(1) the existence of a contract; (2) knowledge of the

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Midwest Sports Marketing, Inc. v. Hillerich & Bradsby of Canada, Ltd., 552 N.W.2d 254, 267 (Minn. App. 1996), *review denied* (Minn. Sept. 20, 1996), the parties agreed that the district court should consider MPI's tortious-interference claim as the only issue for decision.

contract; (3) intentional procurement of the contract's breach; (4) absence of justification; and (5) damages caused by the breach." *Bebo v. Delander*, 632 N.W.2d 732, 738 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001). Interference might be justified if such action is lawful and based on a legitimate economic interest. *Harman v. Heartland Food Co.*, 614 N.W.2d 236, 242 (Minn. App. 2000). The burden is on the plaintiff to "show that the breach of plaintiff's contract with the third party resulted at least in part from the defendant's commission of an independent tort or other illegality." *Id.* MPI alleges that Local 539 was not justified in intentionally procuring the contract breach because the union's MRP, which if legally funded might properly be used to induce an employer into hiring union employees, was here illegally funded.

For purposes of this appeal, this court will consider as true MPI's claims that Local 539 knowingly and intentionally induced MD to breach its subcontract with MPI, causing MPI damage. This court will also consider as true-regardless of whether it can be proved-MPI's claim that Local 539's MRP grant was funded in some part by wage deductions on prior Davis-Bacon and MPWA projects in violation of federal and state prevailing wage laws. This allegation of illegal activity, MPI insists, forms the basis of its lawsuit. Accordingly, the limited issue before this court is whether the district court correctly determined that federal labor law preempts state jurisdiction over MPI's claim. "When federal preemption bars relief under any set of facts consistent with the pleadings, the complaint fails to state a claim and must be dismissed." *Leonard v.*

Northwest Airlines, Inc., 605 N.W.2d 425, 428 (Minn. App. 2000), *review denied* (Minn. Apr. 18, 2000).

The United States Supreme Court articulated the doctrine of federal preemption as it relates to federal labor law in *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 79 S. Ct. 773 (1959). The *Garmon* court held that states are preempted from regulating conduct that "may fairly be assumed" to be a protected labor practice under section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. § 157, or to be a prohibited labor practice under section 8 of the NLRA, 29 U.S.C. § 158, except when the type of conduct involved constitutes an imminent threat to public order or implicates deeply rooted local interests.[3] *Id.* at 244, 79 S. Ct. at 779. When it is unclear whether an activity is governed by sections 7 or 8, "these determinations [must] be left in the first instance to the National Labor Relations Board." *Id.* at 244-45, 79 S. Ct. at 779. The Supreme Court later modified *Garmon* to permit state jurisdiction over union conduct that is only arguably protected, as opposed to clearly protected and thus preempted, if "the party who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of" obtaining a Board ruling on the matter. *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 202-03, 98 S. Ct. 1745, 1760 (1978).

In this case, MPI does not dispute that a union's use of MRP grant money to subsidize wage

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[3] MPI does not, and could not, argue that either exception applies to this matter.

costs is a protected activity under section 7 of the NLRA. *See Int'l Bhd. of Elec. Workers, Local 48, AFL-CIO (Kingston Constructors, Inc.) & Patrick Mulcahy*, 332 N.L.R.B. 1492, 1496 (2000) ("The Board has held that 'job targeting' programs, such as the Union's MRP program, are not inconsistent with public policy and are affirmatively protected by Section 7.").[4] MPI argues that the Board has already determined that an MRP funded with union employees' wages from federal prevailing wage projects violates the Davis-Bacon Act, thus removing the program from federal labor law protection and from application of the *Garmon* preemption doctrine. We agree.

MPI relies on the Board's decision in *Kingston Constructors*. There, the Board concluded that the union violated section 8 of the NLRA when it threatened to fire members who failed to pay MRP dues from their employment on Davis-Bacon projects. *Id.* at 1502. In reaching its conclusion, the Board deferred to previous decisions by federal courts of appeal and the labor department. *Id.* at 1501. Those decisions concluded that a union collecting dues from Davis-Bacon projects to fund job-targeting programs violates the Davis-Bacon Act "by returning a portion of employees' wages to contractors and by tending to inflate computations of prevailing wages." *Id.* (relying on *Int'l Bhd. of Elec. Workers, Local 357, AFL-CIO v. Brock*, 68 F.3d 1194 (9th Cir. 1995); *Bldg. & Constr. Trades Dep't, AFL-*

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[4] Although no section in the NLRA refers specifically to MRPs or job-targeting programs, section 7 provides that union employees may "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (2006).

CIO v. Reich, 40 F. 3 d 1275 (D.C. Cir. 1994); and *In re Bldg. & Constr. Trades Unions Job Targeting Programs*, No. 90-02, 1991 WL 494718 (W.A.B. June 13, 1991)). Such deference was required, according to the Board, because it "has no institutional expertise or authority with respect to the interpretation of Davis-Bacon." *Id.* Thus "[t]he Labor Department and the courts, not the Board, have the responsibility to enforce the Davis-Bacon Act." *Id.* at 1500. The Board's decision was enforced by the Ninth Circuit Court of Appeals, which approved of the Board's "correct[] determin[ation] that deductions from employees' wages which revert to contractors and artificially increase the prevailing local wages are antithetical to the purposes of the Davis-Bacon Act." *Nat'l Labor Relations Bd. v. Int'l Bhd. of Elec. Workers, Local 48, AFL-CIO*, 345 F.3d 1049, 1057 (9th Cir. 2003).[5]

By acknowledging that it lacks authority to interpret federal non-labor policy in the form of the Davis-Bacon Act, the Board's decision in *Kingston Constructors* suggests two interrelated propositions. The first is that an MRP is no longer protected union activity under section 7 of the NLRA when it violates the Davis-Bacon Act. MPI urges us to adopt this position, and points to the federal court of appeals decision in *Can-Am Plumbing, Inc. v. Nat'l Labor Relations Bd.*, 321 F.3d 145, 152 (D.C. Cir. 2003), which interprets *Kingston Constructors* to hold that

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[5] Federal courts of appeal have further held that this is a general prohibition that applies regardless of whether the actual contract at issue is a Davis-Bacon project. *Can-Am Plumbing, Inc. v. Nat'l Labor Relations Bd.*, 321 F.3d 145, 152 (D.C. Cir. 2003) (citing *Brock*, 68 F.3d at 1201 and *Reich*, 40 F.3d at 1283).

"ordinarily a [MRP or job-targeting program] is clearly protected under section 7 . . . unless is violates federal policy." If we accept *Can-Am Plumbing*'s interpretation, that an MRP that violates the Davis-Bacon Act is no longer protected under federal labor law, then the *Garmon* preemption doctrine does not apply to bar state jurisdiction.

The second proposition suggested by *Kingston Constructors* is that the Board has no preemptory jurisdiction over singular challenges to the union's administration of its MRP under the Davis-Bacon Act. This position is consistent with the Supreme Court's modified preemption doctrine. Notwithstanding the federal court's interpretation in *Can-Am Plumbing*, the Board has not definitively ruled that an MRP that violates the Davis-Bacon Act is unprotected activity under the NLRA. Consequently, an allegedly unlawful MRP is at best *arguably protected* activity, which under *Sears, Roebuck* means that state jurisdiction over the union's conduct exists in the absence of Board participation. *See* 436 U.S. at 203, 98 S. Ct. at 1760 (holding that states may regulate arguably protected union activity if the appropriate party did not raise the issue with the Board and the other party could not otherwise obtain a Board ruling). In this case, Local 539 has not filed a charge with the Board, and neither party disputes that MPI cannot seek the Board's ruling on this matter. Accordingly, we conclude that state jurisdiction over MPI's tort claim is not preempted by federal labor law.[6]

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[6] In light of the above analysis and conclusion, we decline to further discuss MPI's argument that *Can-Am Plumbing* is directly analogous to this case. While we find the federal court's

Local 539 argues that the district court correctly relied on *BE & K Constr. Co. v. United Bhd. of Carpenters & Joiners of Am., AFL-CIO*, 90 F.3d 1318 (8th Cir. 1996), to conclude that MPI's claim was preempted by federal labor law. In *BE & K Constr.*, a non-union contractor was hired as a general contractor on a construction project, but was later terminated after union representatives asked the employer to reconsider the contract or be subject to union picketing or handbilling. 90 F.3d at 1321-23. Contractor sued the unions in federal court, alleging that they violated section 303 of the Labor Management Relations Act (LMRA) by engaging in unlawful secondary boycott activity, namely, threatening and coercing the employer to breach its contract with contractor. *Id.* at 1323.

Contractor also raised a tortious-interference-with-contract claim under state law. *Id.* A jury found in favor of contractor on both claims, and the unions challenged the verdict on appeal. *Id.* at 1324.

The Eighth Circuit Court of Appeals reversed the verdict, holding that contractor's tortious-interference claim was preempted by federal labor law. *Id.* at 1330. The court explained that while section 303 of the LMRA protects secondary union activity such as handbilling or picketing, states may regulate such "secondary activity[] that is marked by

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analysis informative, we note that the decision does not set forth any legal principle to follow, but instead remands to the Board for more adequate analysis of the issues raised regarding violations of the Davis-Bacon Act. *Can-Am Plumbing*, 321 F.3d at 154. We further note that on remand, the Board declined to engage in such analysis on procedural grounds. *Can-Am Plumbing, Inc., & United Ass'n of Journeymen & Apprentices in the Plumbing & Pipefitting Indus. of the U.S. & Canada, Local 342, AFL-CIO*, 350 N.L.R.B. No. 75 (2007).

violence and imminent threats to the public order." *Id.* at 1328. Contractor had argued that the union threatened violence, thus fitting its allegation within the exception to the *Garmon* preemption doctrine. *Id.* at 1330. But the court determined that contractor had failed to present evidence supporting that allegation. *Id.* at 1331. As a result, according to the court, the unions engaged in federally protected conduct squarely within federal labor law, which meant that contractor's state tort claim was barred. *Id.*

We disagree with Local 539 that *BE & K Constr.* is analogous to MPI's case, largely because *BE & K Constr.* does not address MRPs or union activity with respect to state or federal prevailing wage statutes. We note that the district court here did not explain why it thought *BE & K Constr.* was persuasive or controlling, and we are uncertain as to the district court's reasoning. Moreover, *BE & K Constr.* is distinguishable because there contractor argued that while the alleged union activity would otherwise be protected by federal labor law and preempted from state regulation, the *Garmon* preemption exception for imminent threats or violence applied to permit state jurisdiction. *Id.* The court of appeals held that federal preemption barred contractor's claim, but only after it determined that contractor failed to prove that the union activity fell within the exception. *Id.*

In this case, however, MPI strenuously argues that it is not alleging that Local 539 engaged in any activity that falls within the scope of federal labor law, and insists that neither the *Garmon* preemption doctrine nor its exceptions applies to this matter. MPI's complaint supports its argument, and under

our standard of review, we must construe inferences in MPI's favor. We further note that unlike contractor in *BE & K Constr.*, MPI has not had a chance to prove its case. Thus, *BE & K Constr.* does not pertain to our decision here.

Reversed and remanded.

s/ Gordon Shumaker

8/18/08

STATE OF MINNESOTA
IN SUPREME COURT

A07-1706

Court of Appeals Anderson, G. Barry, J.

Midwest Pipe Insulation, Inc.,
d/b/a MPI, Inc.,
Respondent,

vs.

Filed: August 6, 2009
Office of Appellate Courts

MD Mechanical, Inc.,
Defendant,

Minneapolis Pipefitters Union, Local 539,
Appellant.

Brendan D. Cummins, Nicole M. Blissenbach, Miller-O'Brien-Cummins, P.L.L.P., Minneapolis, Minnesota, for appellant.

Alec J. Beck, Douglas P. Seaton, Michael L. McCain, Seaton, Beck & Peters, P.A., Minneapolis, Minnesota, for respondent.

Terry R. Yellig, Sherman, Dunn, Cohen, Leifer & Yellig, P.C., Washington, D.C., for amicus curiae Building and Construction Trades Department, AFL-CIO.

SYLLABUS

Where complained-of activity is prohibited by the National Labor Relations Act, plaintiff's action is preempted by federal law.

Reversed.

OPINION

ANDERSON, G. Barry, Justice.

This litigation arises out of a dispute over a market recovery program instituted by a construction union, and allegations by a nonunion contractor that it lost a contract as a result of union actions. We hold that the litigation at issue is preempted by the National Labor Relations Act, 29 U.S.C. §§ 151-169 (2006).

Respondent Midwest Pipe Insulation, Inc. (MPI) is a nonunion insulation contractor in the business of pipe, boiler, and ductwork installation throughout the state of Minnesota. Appellant Minneapolis Union, Pipefitters Local 539 (Local 539), is an unincorporated labor organization.[1] MD Mechanical, Inc. (MD) is a Minnesota corporation engaged in mechanical and pipefitting work. The litigation at issue concerns Local 539's alleged inducement of a breach of a subcontract between MD and MPI for work on a St. Michael-Albertville elementary school construction project in Wright County.

Local 539 conducts a market recovery program, which is designed to maintain and improve the market share of unionized contractors by subsidizing the wage costs of such contractors who successfully bid on construction projects. Local 539's market recovery program provides grants to contractors who agree to sign Local 539's collective bargaining agreement and agree that all covered pipefitter-work will be

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[1] Because this case is before us on an appeal from a motion on the pleadings, we accept the allegations in the challenged pleading as true. *State ex rel. City of Minneapolis v. Minneapolis St. Ry. Co.*, 238 Minn. 218, 223, 56 N.W.2d 564, 567 (1952). As such, the facts *are* taken from MD's complaint.

performed by pipefitters dispatched from Local 539. Union members fund the program through wage deductions. Deducted amounts are transferred into Local 539's market recovery program.

The Wright County building project at issue involved the construction of a new elementary school for the St. Michael-Albertville communities. The project was privately funded and not subject to the federal Davis-Bacon Act, 40 U.S.C. §§ 3141-48 (2006),[2] or the Minnesota Prevailing Wage Act (MPWA), Minn. Stat. §§ 177.41-44 (2008).[3]

On June 8, 2006, MPI submitted a subcontractor's bid to MD to furnish and provide labor and materials, including, but not limited to, plumbing, hydronic pipe, and external duct insulation, for the school construction. The same day, Local 539

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[2] The Davis-Bacon Act provides, among other things, that laborers on federal construction projects must be paid no less than the minimum wage specified by the Secretary of Labor, "without subsequent deduction or rebate on any account." 40 U.S.C. § 3142(c)(1). It was enacted to protect union employees. *United States v. Binghamton Constr. Co.*, 347 U.S. 171, 177 (1954). The Davis-Bacon Act does not create a private right of action under a contract that does not call for Davis-Bacon work. *Univs. Research Ass'n '72 v. Coutu*, 450 U.S. 754, 783-84 (1981).

[3] The MPWA provides that laborers on projects financed by state funds must be paid wages "comparable to wages paid for similar work in the community as a whole." Minn. Stat. § 177.41. It does not prohibit deductions or rebates. Although neither the Davis-Bacon Act nor the MPWA apply to this particular project, MPI alleges that Local 539 previously violated these acts by deducting dues from other projects covered by the Davis-Bacon Act or the MPWA; that Local 539 used those dues to fund, at least in part, the market recovery grant offered to MD; and that those violations would make the market recovery grant illegal.

awarded a market recovery program grant in the amount of $80,000 to MD relating to pipefitting work on the project covered by Local 539's collective bargaining agreement. MPI alleged that this grant was illegal and violated the MPWA and Davis-Bacon Act "to the extent the 'target money' [was] funded, in whole or part, by deductions from employees' wages paid on past or present [MPWA and/or federal Davis-Bacon] construction projects."

On June 26, 2006, MD accepted MPI's bid of $166,800 and sent MPI a standard subcontract agreement signed and executed by MD's president. But, according to MPI, the award of the subcontract to MPI was not the end of this transaction. MPI alleged in its complaint that on July 11, 2006, MD's president contacted MPI's office manager and informed her that Local 539 was pressuring MD to breach its subcontract agreement with MPI.

MPI alleged that Local 539 threatened to rescind the promised grant if MPI's nonunion laborers performed the subcontract insulation work for the school construction project. Local 539 denied these allegations.

MPI alleged that on July 11, 2006, MD sent a letter to MPI terminating the June 26, 2006, MPI subcontract agreement. MPI further alleged that MD subsequently hired a union contractor to perform the pipe insulation work on the project, in place of MPI. MPI filed a complaint against MD and Local 539, alleging that the breach caused substantial damage to MPI.

Local 539 filed a motion for judgment on the pleadings. The district court granted the motion, holding that MPI's state-law tortious interference

claim was preempted by federal labor law. On appeal, the court of appeals reversed the district court, holding that MPI's claim was not preempted by federal labor law. We granted Local 539's petition for further review, which asked us to reverse the court of appeals and we conclude that the district court properly dismissed the case because MPI's claim was preempted by federal labor law.

An appeal from a dismissal on the pleadings is reviewed de novo. *Lorix v. Cromptron Corp.*, 736 N.W.2d 619, 623 (Mimi. 2007). To withstand a motion for judgment on the pleadings, MPI must state facts that, if proven, would support a colorable claim and entitle it to relief. *N. States Power Co.* v. *Franklin*, 265 Minn. 391, 395, 122 N.W.2d 26, 29 (1963). The district court must accept the allegations contained in the challenged pleading as true. *State ex rel. City of Minneapolis v. Minneapolis St. Ry. Co.*, 238 Minn. 218, 223, 56 N.W.2d 564, 567 (1952).

This appeal concerns the primary jurisdiction of the National Labor Relations Board (NLRB) to resolve labor disputes under the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169 (2006).

The NLRA protects and prohibits certain union activities. On one hand, section 7 of the NLRA protects the right to unionize "and to engage in other concerted activities for the purpose of collective bargaining . . . ." 29 U.S.C. § 157. Both parties agree that market recovery programs are generally protected by this section.

On the other hand, section 8(b)(4)(ii) of the NLRA makes it an unfair labor practice for a union "to threaten, coerce, or restrain any person engaged in commerce" where the goal is to force the person "to

cease doing business with any other person." 29 U.S.C. § 158(b)(4)(ii)(B). Section 8(e) of the Act makes it an unfair labor practice for any union and employer to enter into an agreement in which the employer agrees to cease doing business with any other person, with the exception of contracting and subcontracting in the construction industry. 29 U.S.C. § 158(e).

The NLRA does not include an express preemption provision, but the United States Supreme Court has repeatedly held that the NLRB's power to implement the NLRA is exclusive. *See, e.g. Bethlehem Steel Co.* v. *New York State Labor Relations Bd.*, 330 U.S. 767, 775-77 (1947). The rationale behind this exclusive jurisdiction is to ensure that the NLRA is applied uniformly nationwide. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959) ("To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law."). As a result, an employer grievance against a union that is subject to the NLRA, and thus within the NLRB jurisdiction, is generally not subject to litigation in a state court if it means that two potentially conflicting statutes (the state law alleged to be violated and the applicable provision of the NLRA) would be "brought to bear on the same activity." *Garner v. Teamsters Local Union No. 776*, 346 U.S. 485, 498-99 (1953).

In *Garmon*, the United States Supreme Court concluded that "[w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment

requires that state jurisdiction must yield."[4] 359 U.S. at 244. Thus, "[w]hen an activity is arguably subject to § 7 or § 8 of the Act," state jurisdiction is preempted in favor of the NLRB. *Id.* at 245. If Local 539's actions were clearly or arguably protected under section 7 of the NLRA, or clearly or arguably prohibited under section 8 of the NLRA, the district court does not have jurisdiction over MPI's claims.

While it denies having done so, Local 539 argues that if it had threatened to withdraw its market recovery program grant from MD if MD did not terminate the MPI-MD subcontract and hire a union contractor, that would be an unfair labor practice ("secondary pressure") prohibited by section 8(b)(4) of the NLRA. Section 8(b)(4) provides: "It shall be an unfair labor practice for a labor organization . . . to threaten, coerce, or restrain any person engaged in commerce . . . where ... an object thereof is forcing or requiring any person . . . to cease doing business with any other person." 29 U.S.C. § 158(b)(4)(ii)(B).

We interpreted this provision in *Hennepin Broadcasting*, where an employer brought litigation against a labor union alleging that, among other things, the union engaged in a "conspiracy" to force the employer to change managers and engaged in an "unlawful secondary boycott." *Hennepin Broad. Assocs. v. Am. Fed'n of Television & Radio Artists*, 301 Minn. 508, 510-11, 223 N.W.2d 391, 393-94 (1974). With the exception of allegations of violence, we determined that the remaining allegations were

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[4] Section 7 sets out conduct that is protected by the NLRA; section 8 sets out conduct that is prohibited. 29 U.S.C. §§ 157, 158.

preempted by the NLRA. *Id.* at 511, 223 N.W.2d at 394. In this case, MPI alleges that Local 539 threatened to rescind its market recovery program grant in order to coerce MD into breaking its contract with MPI. MPI's allegations fall squarely under the prohibitions outlined in section 8.[5]

MPI attempts to bypass the section 8 analysis, and our holding in *Hennepin Broadcasting,* by asserting that because Local 539 violated provisions of the Davis-Bacon Act, Local 539's actions are no longer protected by the NLRA, and therefore preemption no longer applies. But MPI's suit is preempted not because Local 539's actions are *protected* by the NLRA, in which case illegal activity might be relevant, but rather because Local 539's actions are *prohibited.*[6] Because Local 539's actions,

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[5] We note that the NLRB's Advice Memorandum, Midwest Pipe Insulation, Case 18-CA-18838 (Jan. 30, 2009), although not binding on our court, takes a similar position. On August 29, 2008, 3 days after the court of appeals ruled that MPI's tortious interference claim was not preempted by federal labor law, Local 539 filed an unfair labor practice charge with the NLRB, alleging that MPI's lawsuit was preempted and interfered with the exercise of the union's rights under Section 7. The Advice Memorandum, prepared by counsel to the NLRB, states: "The Union's alleged tortious conduct was, if substantiated, actually prohibited by the Act because it violated Section 8(b)(4)(ii)(B)." The Memorandum further observes: "Although [MPI's] lawsuit's focus on conduct actually prohibited by the Act renders it preempted under Garmon, a preempted lawsuit that does not restrain or coerce employees in the exercise of their Section 7 rights does not constitute an unfair labor practice." The Memorandum recommends that Local 539's unfair labor practice charge be dismissed because the activity with which MPI's state court complaint allegedly interfered is not protected by federal labor laws.

[6] MPI argues instead that Local 539's alleged actions are not prohibited under section 8 of the NLRA. We disagree and note

as alleged by MPI, are prohibited by the NLRA under section 8, it is irrelevant whether Local 539 also violated the Davis-Bacon Act and whether that violation would take the market recovery program outside of the ambit of section 7. When a union's actions are prohibited or arguably prohibited by the NLRA, state courts must cede jurisdiction to the NLRB. *Garmon,* 359 U.S. at 244. Thus, as a result of NLRA preemption, state courts are deprived of jurisdiction over MPI's allegations. We reverse the court of appeals and affirm the district court's dismissal on the pleadings. In doing so, we express no opinion about the substantive merits of any of the claims of the parties to this litigation.

Reversed.

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again that the NLRB Advice Memorandum concludes that the allegations, if true, are prohibited under section 8.

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: January 30, 2009

TO : Robert Chester, Regional Director Region 18

FROM : Barry J. Kearney, Associate General Counsel Division of Advice

SUBJECT:	Bill Johnson's Chron
Midwest Pipe Insulation	133-7600
	220-2500
Case 18-CA-18838	240-6760
	512-5009
	560-2575-6737

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(1) by instituting and maintaining a state court lawsuit for tortious interference with contract, alleging that the Union threatened to withhold market recovery program funds from a pipefitter contractor unless it terminated its subcontract with the Employer.

We conclude that the Region should dismiss the instant charge because the Employer's lawsuit is based upon Union conduct that violated Section 8(b)(4)(ii)(B) and is not protected under the Act. Moreover, the Employer is seeking injunctive relief that would interfere with the operation of the Union's market recovery program only with respect to prevailing wage act projects, and that activity also is not protected.

FACTS

Pipefitters Local Union No. 539 ("the Union") has operated a market recovery program ("MRP") for about ten years, in order to organize nonsignatory contractors and to increase job opportunities for Union members. The Union grants MRP funds to Union contractors who perform pipefitting work, to enable them to bid competitively with nonunion contractors. The MRP is funded from the Union's general dues. The Union estimates that less that 10% of those dues are from employees working on Davis-Bacon and Minnesota Prevailing Wage Act projects. Moreover, the Union does not offer MRP grants to contractors on Davis-Bacon or Minnesota Prevailing Wage projects.

MD Mechanical is engaged in plumbing and pipefitting work and is signatory to the Union's collective-bargaining agreement with the Minnesota Mechanical Contactors Association. On June 8, 2006,[1] the Union granted MD Mechanical $80,000 in MRP funds in connection with its performance of pipefitting work on the St. Michael/Albertville Elementary school project. This project was not covered by Davis-Bacon or the Minnesota Prevailing Wage Act. On June 26, MD Mechanical agreed to subcontract the pipe insulation work on the project to Midwest Pipe Insulation, Inc. ("the Employer") and sent the Employer a standard subcontract agreement signed by MD Mechanical's president, Michael Brum.

The Employer claims that on July 11, Brum telephoned the Employer's office manager and advised her that the Union was pressuring Brum to cancel its contract with the Employer, by threatening

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[1] All dates are in 2006 unless otherwise indicated.

to rescind the MRP grant if the Employer's nonunion employees worked on the project. That same day, MD Mechanical sent a letter to the Employer terminating its subcontract. MD Mechanical then hired a union contractor to perform the pipe insulation work on the project.

The Union denies that any of its agents threatened MD Mechanical, noting that the Union does not have jurisdiction over pipe insulation work. MD Mechanical asserts that it rescinded the contact because the Insulators Union threatened to shut the job down with pickets. MD Mechanical's president claims also that a Union representative told him that if the Insulators Union picketed the project, Union members would not cross the picket line.

On May 10, 2007, the Employer filed an action against the Union in state court asserting claims for tortious interference with contract, unfair competition, and violation of the Minnesota Prevailing Wage Act.[2] The Employer sought compensatory damages, a disgorging of any profits received, and a permanent injunction enjoining the Union from: "[a]ttempting to promote, solicit, contract and/or use 'target money' and/or market recovery programs on Davis-Bacon and Minnesota Prevailing Wage construction jobs."

The Union moved for judgment on the pleadings on the ground that the lawsuit was preempted by federal labor law. The Hennepin County District Court granted the Union's motion on August 23, 2007. The Employer appealed, and on

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[2] The Employer subsequently dismissed the Minnesota Prevailing Wage Act claim.

August 26, 2008, the Minnesota Court of Appeals reversed. The Court of Appeals held that the state claims were not preempted, citing Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978), because the MRP is only arguably protected under Board law, and there was no pending unfair labor practice charge that would enable the Board to resolve the issue of whether the MRP was protected.

On August 29, 2008, the Union filed the instant Section 8(a)(1) charge, alleging that the Employer's lawsuit is preempted and interferes with the exercise of Section 7 rights, and, alternatively, that the lawsuit is baseless and filed and maintained in retaliation for protected, concerted activity. The Union has also appealed the Court of Appeals decision to the Minnesota Supreme Court, and that appeal is pending.

ACTION

We conclude that the Region should dismiss the instant charge because the Employer's lawsuit does not interfere with protected, concerted activity. The lawsuit is based on a Union threat that constituted prohibited secondary conduct and seeks to enjoin the operation of the MRP only on publicly-funded projects, which also is unprotected.

We note first that even if the Employer's lawsuit is preempted, it does not violate Section 8(a)(1) in the absence of interference with Section 7 rights. The Supreme Court has long held that the Act preempts state court lawsuits challenging activities that are actually protected by Section 7 or prohibited

by Section 8.[3] The Court also has held that activities that are either arguably protected or arguably prohibited are also subject to the Board's primary jurisdiction.[4] A preempted state court lawsuit, however, does not, in itself, violate the Act absent interference with Section 7 rights.[5]

Second, absent interference with Section 7 rights, the analysis under Bill Johnson's[6] and BE&K[7] to determine if a state lawsuit is protected under the First Amendment is not implicated. The Supreme Court's decisions in those cases were premised upon a state lawsuit filed in retaliation for the exercise of Section 7 rights; only in those circumstances must the Board weigh the litigating party's First Amendment right to petition the courts against employees' Section 7 rights.[8]

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[3] San Diego Building Trades Council v. Garman, 359 U.S. 236, 245 (1959) ("If the Board decides, subject to appropriate federal judicial review, that conduct is protected by § 7, or prohibited by § 8, then the matter is at an end, and the States are ousted of all jurisdiction.").

[4] Id. at 246. In such instances, however, a state court lawsuit is not preempted by the Board's primary jurisdiction if the party who could have presented the issue to the Board has not done so and the other party has no means of doing so. Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. at 202-203.

[5] Bakery Workers Local 6 (Stroehmann Bakeries), 320 NLRB 133, 138 (1995) (no violation of Section 8(b)(1)(A) where union's preempted lawsuit against the Board and the employer did not restrain or coerce employees).

[6] Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983).

[7] BE&K Construction Co. v. NLRB, 536 U.S. 516 (2002).

[8] See Bill Johnson's, 461 U.S. at 734-737 (lawsuit based on picketing and handbilling filed in retaliation for the filing of unfair labor practice charges); BE&K, 536 U.S. at 507-508

The Union's Alleged Threat

The Union's alleged tortious conduct was, if substantiated, actually prohibited by the Act because it violated Section 8(b)(4)(ii)(B). The Employer's lawsuit alleges that the Union tortiously interfered with a contract by threatening to withhold MRP funds from MD Mechanical unless MD Mechanical cancelled its subcontract with the Employer. A denial of MRP funds or similar economic relief from contractual wage and benefit terms constitutes Section 8(b)(4)(ii) coercion.[9] And economic coercion to force a neutral employer to cease doing business with a nonunion company clearly violates Section 8(b)(4)(ii)(B).[10] In addition, the Union violated Section 8(b)(4)(ii)(B) even if, as MD Mechanical maintains, the Union merely threatened to honor another union's picket line on the jobsite, since the object of that conduct was to induce MD Mechanical to cease

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(lawsuit based on union's lobbying of local authorities, picketing and handbilling, and filing of contractual grievances).

[9] Sheet Metal Workers Local 91 (Schebler Co.), 294 NLRB 766, 775 (1989), enfd. in pert. part 905 F.2d 417 (D.C. Cir. 1990) (Union violated Section 8 (b)(4) (ii) (A) by denying economic relief to contractors who refused to sign a Section 8(e) agreement); Sheet Metal Workers Local 9 (United McGill Corp.), Cases 27-CC-846 & 27-CE-39, Advice Memorandum dated October 15, 1997 at 9 (Union violated Section 8(b) (4) (ii) (A) by disqualifying employer from MRP and seeking refund of monies granted in order to coerce employer to comply with a Section 8(e) agreement).

[10] E.g., United Scenic Artists Local 829, 267 NLRB 858, 863 (1983) (threatening to fine employer for using props sculpted by nonunion employees), revd. on other grounds 762 F.2d 1027 (D.C. Cir. 1985); Operating Engineers Local 12, 204 NLRB 742, 756-757 (1973), enfd. in pert. part 511 F.2d 848 (9th Cir. 1975) (fining signatory contractors for using nonunion construction vehicle repairmen).

doing business with the Employer.[11] Thus, the Employer's lawsuit is based on Union conduct that was prohibited rather than protected by the Act.

Although the lawsuit's focus on conduct actually prohibited by the Act renders it preempted under Garmon,[12] a preempted lawsuit that does not restrain or coerce employees in the exercise of their Section 7 rights does not constitute an unfair labor practice.[13] The lawsuit here does not impinge upon any group of employees' Section 7 rights and thus, does not violate Section 8(a)(1).

The Union's Market Recovery Program

The Employer's lawsuit also attacks the Union's MRP, but it attacks only the application of the MRP to publicly-funded projects. Union market recovery or job targeting programs that enable union contractors to competitively bid against nonunion contractors are generally protected under Section 7.[14]

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[11] See, e.g., Teamsters Local 247 (Rymco), 332 NLRB 1230 fn.1, 1232-1233 (2000) (threat to strike general contractor if nonunion subcontractor allowed on the project); Operating Engineers Local 3 (Westar Marine Services), 340 NLRB 1053, 1057 (2003) (threat of strike at the general contractor's jobsite in order to pressure subcontractor to sign union contract); Elevator Constructors Local 91 (Otis Elevator Co.), 345 NLRB 925, fn.1, 929 (2005) (threat of work stoppage and actual work stoppage in order to force neutral employer to cease doing business with general contractor who used nonunion subcontractor).

[12] 359 U.S. at 245.

[13] See Stroehmann Bakeries, 320 NLRB at 138.

[14] See Manno Electric, 321 NLRB 278, 298 (1996), affd. mem. 127 F.3d 34 (5th Cir. 1997) (state court lawsuit based on job targeting program was therefore preempted and violated Section 8(a) (1)); Associated Builders & Contractors, 331 NLRB 132, fn.1 (2000), vacated in part not relevant here pursuant to a

On the other hand, the Board has held that the collection of dues owing from employment on Davis-Bacon projects for MRPs is "'inimical to public policy.'"[15] In Kingston Constructors, the Board deferred to Department of Labor ("DOL") and court decisions holding that the collection of dues on federal-funded projects and the granting of MRP funds to contractors on such projects violate Davis-Bacon.[16]

Seeking to reconcile these two lines of cases, in Can-Am Plumbing the Board held that a job targeting program where "at most only 2 to 3 percent of the funds ... came from Federal or State prevailing wages jobs" constituted protected activity.[17] Accordingly, a state court lawsuit "which broadly attack[ed] the entire job targeting program" was preempted, was not therefore subject to First Amendment protection under Bill Johnson's,[18] and violated Section 8(a)(1).[19]

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settlement, 333 NLRB 955 (2001) (same).

[15] Electrical Workers Local 48 (Kingston Constructors), 332 NLRB 1492, 1501-1502 (2000), modified as to remedy 333 NLRB 963 (2001), enfd. 345 F.3d 1049 (9th Cir. 2003) (holding that union violated Section 8(b)(1)(A) by threatening employees with discharge for failing to pay MRP dues based on Davis-Bacon projects).

[16] Ibid., citing Building & Construction Trades Department v. Reich, 40 F.3d 1275, 1280 (D.C. Cir. 1994); Electrical Workers Local 357 v. Brock, 68 F.3d 1194, 1200-1202 (9th Cir. 1995).

[17] Can-Am Plumbing, 335 NLRB 1217, 1217 (2001), enf. denied 321 F. 3d 145 (D.C. Cir. 2003), reaffirmed on remand 350 NLRB 947 (2007).

[18] See 461 U.S. at 738, fn.5.

[19] Can-Am Plumbing, 335 NLRB at 1217. An Administrative Law Judge reached a different result in a case involving a lawsuit that was narrowly tailored to challenge only the application of a job targeting program to two state-funded

Here, the narrow injunctive relief the Employer seeks in state court does not interfere with protected activity. The Employer has not mounted a broad legal challenge to the entire operation of the Union's MRP but, rather, seeks to enjoin only the MRP's application to publicly-funded projects. The injunction sought would restrain the collection of dues on publicly-funded projects and the grant of funds to contractors on such projects. With respect to dues collection, the Board found in Kingston Constructors that the collection of dues from publicly-funded projects is contrary to public policy and presumably unprotected.[20] With respect to MRP grants, this Union does not provide money to contractors working on publicly-funded projects, so there is no activity to be enjoined.[21]

Since the Employer's lawsuit here is not based upon protected activity, a Bill Johnson's analysis is not required. Given the absence of any interference with protected activity, there is no Section 8(a)(1) violation. Accordingly, absent withdrawal, the Region

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projects and left the program "intact" with respect to private projects. J.A. Croson Co., Case 9-CA-35263, JD-6903 (Giannasi), dated June 27, 2003 at 9-11. The Judge concluded that the lawsuit "narrowly addressed" conduct that was only arguably protected under Section 7 and, since the lawsuit was concluded before the General Counsel issued complaint, the Judge dismissed the complaint. Id. at 9, 12.

[20] See Electrical Workers Local 48 (Kingston Constructors), 332 NLRB at 1501-1502.

[21] Moreover, in light of DOL and court cases finding MRP grants violative of Davis-Bacon, it is unlikely that the Board would find grants on such projects protected. See id. at 1501 (noting that the DOL and the courts "emphasized" that MRPs violate Davis-Bacon "by returning a portion of employees' wages to contractors").

should dismiss the instant charge.

B.J.K.

ROF(s) - 2
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18838.Response.MPI.dlw

STATE OF MINNESOTA **JUDGMENT**

Midwest Pipe Insulation, Inc.,
d/b/a MPI, Inc., Supreme Court
Respondent,
vs. Appellate Court # A07-1706
Trial Court # 27-CV-07-11647
MD Mechanical, Inc.,
Defendant,
Minneapolis Pipefitters Union, Local 539,
Appellant

Pursuant to a decision of Supreme Court duly made and entered, it is determined and adjudged that the decision of the Hennepin County District Court, Civil Division herein appealed from be and the same hereby is affirmed and judgment is entered accordingly. A certified copy of the entry of judgment and the court's decision is herewith transmitted and made part of the remittitur.

It is further determined and adjudged that Minneapolis Pipefitters Union, Local 539 herein, have and recover of Midwest Pipe Insulation, Inc., d/b/a MPI, Inc. herein the amount of $3,505.94 as costs and disbursements in this cause, and that execution may be issued for the enforcement thereof.

Dated and signed: September 28, 2009

FOR THE COURT

Attest: Frederick K. Grittner
Clerk of the Appellate Courts
By: s/ Kim Ghilardi
Assistant Clerk

Statement For Judgment

Costs and Disbursements in the Amount of $3,505.94
Attorney Fees in the Amount of:
Other:

Total: $ 3,505.94

Satisfaction of Judgment filed: _____
Dated

Therefore the above judgment is duly satisfied in fill and discharged of record

Attest: Frederick K. Grittner *By:* _____
Clerk of the Appellate Courts *Assistant Clerk*

STATE OF MINNESOTA SUPREME COURT

TRANSCRIPT OF JUDGMENT

I, Frederick K. Grittner, Clerk of Appellate Courts, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my signature at the Minnesota Judicial Center,

In the City of St Paul September 28, 2009
Dated

Frederick K. Grittner
Clerk of Appellate Courts

By: s/ Kim Ghilardi
Assistant Clerk

The Davis Bacon Act
40 U.S.C. §§1341-48 (2009)

§ 3141. Definitions

In this subchapter, the following definitions apply:

(1) Federal Government.--The term "Federal Government" has the same meaning that the term "United States" had in the Act of March 3, 1931 (ch. 411, 46 Stat. 1494) (known as the Davis-Bacon Act).

(2) Wages, scale of wages, wage rates, minimum wages, and prevailing wages.--The terms "wages", "scale of wages", "wage rates", "minimum wages", and "prevailing wages" include--

(A) the basic hourly rate of pay; and

(B) for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the forgoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying the costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other federal, state, or local law to provide any of those benefits, the amount of--

(i) the rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to

a third person under a fund, plan, or program; and

(ii) the rate of costs to the contractor or subcontractor that may be reasonably anticipated in providing benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing to the laborers and mechanics affected.

§ 3142. Rate of wages for laborers and mechanics

(a) Application.--The advertised specifications for every contract in excess of $2,000, to which the Federal Government or the District of Columbia is a party, for construction, alteration, or repair, including painting and decorating, of public buildings and public works of the Government or the District of Columbia that are located in a State or the District of Columbia and which requires or involves the employment of mechanics or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics.

(b) Based on prevailing wage.--The minimum wages shall be based on the wages the Secretary of Labor determines to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed

there.

(c) Stipulations required in contract.--Every contract based upon the specifications referred to in subsection (a) must contain stipulations that--

(1) the contractor or subcontractor shall pay all mechanics and laborers employed directly on the site of the work, unconditionally and at least once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and the laborers and mechanics;

(2) the contractor will post the scale of wages to be paid in a prominent and easily accessible place at the site of the work; and

(3) there may be withheld from the contractor so much of accrued payments as the contracting officer considers necessary to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by the laborers and mechanics and not refunded to the contractor or subcontractors or their agents.

(d) Discharge of obligation.--The obligation of a contractor or subcontractor to make payment in accordance with the prevailing wage

determinations of the Secretary of Labor, under this subchapter and other laws incorporating this subchapter by reference, may be discharged by making payments in cash, by making contributions described in section 3141(2)(B)(i) of this title, by assuming an enforceable commitment to bear the costs of a plan or program referred to in section 3141(2)(B)(ii) of this title, or by any combination of payment, contribution, and assumption, where the aggregate of the payments, contributions, and costs is not less than the basic hourly rate of pay plus the amount referred to in section 3141(2)(B) of this title.

(e) Overtime pay.--In determining the overtime pay to which a laborer or mechanic is entitled under any federal law, the regular or basic hourly rate of pay (or other alternative rate on which premium rate of overtime compensation is computed) of the laborer or mechanic is deemed to be the rate computed under section 3141(2)(A) of this title, except that where the amount of payments, contributions, or costs incurred with respect to the laborer or mechanic exceeds the applicable prevailing wage, the regular or basic hourly rate of pay (or other alternative rate) is the amount of payments, contributions, or costs actually incurred with respect to the laborer or mechanic minus the greater of the amount of contributions or costs of the types described in section 3141(2)(B) of this title actually incurred with respect to the laborer or mechanic or the amount determined under section 3141(2)(B) of this title but not actually paid.

§ 3143. Termination of work on failure to pay

agreed wages

Every contract within the scope of this subchapter shall contain a provision that if the contracting officer finds that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid, the Federal Government by written notice to the contractor may terminate the contractor's right to proceed with the work or the part of the work as to which there has been a failure to pay the required wages. The Government may have the work completed, by contract or otherwise, and the contractor and the contractor's sureties shall be liable to the Government for any excess costs the Government incurs.

§ 3144. Authority of Comptroller General to pay wages and list contractors violating contracts

(a) Payment of wages.--

(1) In general.--The Comptroller General shall pay directly to laborers and mechanics from any accrued payments withheld under the terms of a contract any wages found to be due laborers and mechanics under this subchapter.

(2) Right of action.--If the accrued payments withheld under the terms of the contract are insufficient to reimburse all the laborers and mechanics who have not been paid the wages

required under this subchapter, the laborers and mechanics have the same right to bring a civil action and intervene against the contractor and the contractor's sureties as is conferred by law on persons furnishing labor or materials. In those proceedings it is not a defense that the laborers and mechanics accepted or agreed to accept less than the required rate of wages or voluntarily made refunds.

(b) List of contractors violating contracts.--

(1) In general.--The Comptroller General shall distribute to all departments of the Federal Government a list of the names of persons whom the Comptroller General has found to have disregarded their obligations to employees and subcontractors.

(2) Restriction on awarding contracts.--No contract shall be awarded to persons appearing on the list or to any firm, corporation, partnership, or association in which the persons have an interest until three years have elapsed from the date of publication of the list.

§ 3145. Regulations governing contractors and subcontractors

(a) In general.--The Secretary of Labor shall prescribe reasonable regulations for contractors and subcontractors engaged in constructing, carrying out, completing, or repairing public buildings, public works, or buildings or works that at least partly are financed by a loan or grant from the Federal Government. The regulations

shall include a provision that each contractor and subcontractor each week must furnish a statement on the wages paid each employee during the prior week.

(b) Application.--Section 1001 of title 18 applies to the statements.

§ 3146. Effect on other federal laws

This subchapter does not supersede or impair any authority otherwise granted by federal law to provide for the establishment of specific wage rates.

§ 3147. Suspension of this subchapter during a national emergency

The President may suspend the provisions of this subchapter during a national emergency.

§ 3148. Application of this subchapter to certain contracts

This subchapter applies to a contract authorized by law that is made without regard to section 3709 of the Revised Statutes (41 U.S.C. 5), or on a cost-plus-a-fixed-fee basis or otherwise without advertising for proposals, if this subchapter otherwise would apply to the contract.

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT
CASE TYPE: 14 – Other Civil

Midwest Pipe Insulation, Inc.,
d/b/a MPI, Inc.

Court File No. _____

Plaintiff,

COMPLAINT

v.

MD Mechanical, Inc., a
a Minnesota corporation, and
Minneapolis Pipefitters Union, Local 539.

Defendants.

As and for its Complaint against MD Mechanical, Inc. (hereinafter, "MD") and Minneapolis Pipefitters Union, Local 539 (hereinafter, "Local 539") Plaintiff, Midwest Pipe Insulation, Inc., (hereinafter, "MPI") states and alleges as follows:

PARTIES

1. MPI is a Minnesota corporation with its principal place of business in Baxter, Minnesota. MPI is a non-union, merit shop employer, in the business of pipe, boiler and duct work throughout the State of Minnesota.

2. MD is a Minnesota corporation with its principal place of business in St. Cloud, Minnesota. MD is primarily engaged in the business of plumbing work through the State of Minnesota.

3. Local 539 is a labor organization with its principal place of business in Minneapolis, Minnesota.

JURISDICTION AND VENUE

4. This Court has personal jurisdiction over each of the Defendants as Minnesota residents and/or pursuant to Minn. Stat § 543.19(a), (b), (c) and/or (d).

5. The case is properly venued pursuant to Minn.Stat § 542.09 because one of the Defendants resides in the County of Hennepin.

FACTS

The St. Michael – Albertville Elementary School Construction Project

6. The St. Michael – Albertville Elementary School Construction Project (hereinafter "the Project"), is a construction project dedicated to the construction and erection of a new elementary school for the St. Michael-Albertville communities located in Wright County.

7. On or about June 20, 2006, MD entered into a contract with Donlar Construction Company to perform certain labor and furnish certain material, including the installation, alteration and/or repair of the Project's pipefitting systems.

Local 539's "Market Recovery Program"

8. Upon information and belief, Local 539 provides and/or has provided to MD in the past, "target money" from the Union's "market recovery program" (hereinafter "MRP") to subsidize the costs of employing union employees, as opposed to employing non-union employees.

9. The design and purpose of said MRP is to maintain and/or improve the market share of unionized contractors by subsidizing the wage costs of union employers who bid on certain projects, and/or to induce non-union contractors to become union contractors by subsidizing higher wage costs associated with union laborers.

10. Upon information and belief, the "target money" is funded entirely by union employees' wage deductions, which are paid into the Union's managed MRP. Thereafter, the Union strategically and intentionally "targets" for defeat certain construction bids submitted by non-union contractors by using such "target money" to compete against said non-union contractors by providing a wage subsidy for the benefit of the favored union contractor on the targeted job.

11. The "target money" promised and/or provided to MD is illegal and violates the Davis-Bacon Act, 40 U.S.C. § 276(a), *et seq.*, to the extent that the "target money" is funded, in whole or part, by deductions from employees' wages paid on past and/or present Davis-Bacon construction projects.

12. The "target money" promised and/or provided to MD is illegal and violates Minnesota's Prevailing Wage Act, Minn. Stat. §177.44 et seq., to the extent that the "target money" is funded, in whole or part, by deductions from employees' wages paid on past and/or present Minnesota Prevailing Wage construction projects.

Plaintiff's Subcontract Agreement With MD, Local 539's Threats to Rescind Its Promised Targeting Money and Termination and Breach of the Subcontract

13. On or about June 8, 2006, MPI submitted a bid to furnish and provide certain labor, including, but not limited to, plumbing and hydronic pipe insulation and external duct insulation, pursuant to an advertisement for bid by MD, in relation to construction of the Project.

14. On or about June 26, 2006, MD accepted MPI's bid, and sent MPI a standard subcontract agreement signed and executed by Michael Brum, president of MD. Pursuant to the subcontract agreement, MD promised payment in the amount of One Hundred Sixty Six Thousand Eight Hundred Dollars ($166,800.00), upon MPI's full, faithful and prompt performance of the subcontract agreement.

15. On or about July 11, 2006, Michael Bruin contacted Kay Harmdierks, office manager of MPI, and informed her that MD was being pressured by Local 539 to breach its subcontract agreement with MPI. Specifically, Local 539 threatened to rescind it's promised "target money" if MPI's non-union laborers were used to perform the subcontract insulation work for the Project.

16. On or about July 11, 2006, as a result of Local 539's threat to rescind its promised "target money," MD sent a letter to MPI terminating and breaching the June 26, 2006, executed written subcontract agreement with MPI.

17. Upon information and belief, MD was forced by Local 539 to hire a union signatory contractor to replace MPI, in order to perform the pipe insulation work in relation to the Project.

COUNT ONE
Tortious Interference with Contract and/or

With Prospective Business Advantage

18. MPI restates the allegations contained in paragraphs 1 through 17 above as if fully set forth herein.

19. Prior to July 11, 2006, MPI had existing business and/or a contractual relationship with MD pursuant to the terms of the June 26, 2006, signed and executed subcontract agreement.

20. Defendants had knowledge of the existing business and contractual relationship between MPI and MD.

21. By way of its existing and successful business relationships, MPI has a legitimate expectation of continued business opportunities with MD.

22. Defendants engaged in wrongful acts that included, but are not limited to, interfering with MPI's contractual relationship with MD.

23. Defendants knowingly, intentionally and without justification induced MD to breach its obligations with MPI to the benefit of and in favor of Defendants.

24. As a result, Defendants have tortiously interfered with MPI's contractual relationship and/or prospective business advantage.

25. Defendants' tortious interference has caused and will cause substantial damage to MPI.

26. In addition to damages, MPI is entitled to its attorneys' fees.

COUNT TWO
Violations of the Minnesota Prevailing Wage

Act Minnesota Statute §177.41 et. seq.

27. MPI restates the allegations contained in paragraphs 1 through 26 above as if fully set forth herein.

28. Minn. Stat. §177.41, provides:

> "It is in the public interest that public buildings and other public works be constructed and maintained by the best means and highest quality of labor reasonably available and that persons working on public works be compensated according to the real value of the services they perform. It is therefore the policy of this state that wages of laborers, workers, and mechanics on projects financed in whole or part by state funds should be comparable to wages paid for similar work in the community as a whole."

29. Minn. Stat. §177.43, subd. 5 provides:

> "**Penalty.** It is a misdemeanor for an officer or employee of the state to execute a contract for a project without complying with this section, or for a contractor, subcontractor, or agent to pay any laborer, worker, or mechanic employed directly on the project site a lesser wage for work done under the contract than the prevailing wage rate as stated in the contract. This misdemeanor is punishable by a fine of not more than $700, or imprisonment for not more than 90 days, or both. Each agent or subcontractor shall furnish to the contractor evidence of compliance with this

section. Each day a violation of this section continues is a separate offense."

30. Local 539's promised and/or provided "target money" to MD, violates the Minnesota Prevailing Wage Act to the extent that the "target money" was funded, in whole or part, by deductions from employees' wages on past and/or present Minnesota Prevailing Wage construction projects. Such deductions effectively reduce those employees' wages below the required, computed and advertised prevailing wage rate on projects of similar character in the area in which said projects were performed.

31. Local 539's promise and/or providing of "target money" to MD has caused damage and will cause substantial damage to MPI, the construction industry, and Minnesota tax payers because said "target money" either directly or indirectly, through the recycling of employees' wages to the benefit of the union contractors, has the purpose and/or effect of artificially inflating the regional prevailing wage on those past and/or current Minnesota Prevailing Wage Act covered construction projects.

COUNT THREE
Unfair Competition

32. MPI restates the allegations contained in paragraphs 1 through 31 above as if fully set forth herein.

33. MD and Local 539 have caused and will cause MPI severe and serious injury both by advantage in the marketplace and potential damage to MPI's goodwill and reputation, for which MPI should be compensated and enjoined.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court award Plaintiff the following relief:

1. Permanent injunction enjoining the defendants from:

(a) Attempting to promote, solicit, contract and/or use "target money" and/or market recovery programs on Davis-Bacon and Minnesota Prevailing Wage construction jobs.

2. Compensatory damages due to the Defendant's actions and any other damages the Court deems just and necessary.

3. An accounting and disgorging of any profits received by Defendants as a consequence of their actions.

4. Costs, interest, disbursements and penalties in this action as the Court deems proper.

5. Reasonable costs and attorneys' fees as the Court deems proper.

6. All further relief in law or in equity to which it may show it is justly entitled.

Dated May 10, 2007

SEATON, BECK & PETERS, P.A.

s/ Alec J. Beck

Douglas P. Seaton (#127759)
Alec J. Beck (#201133)
Michael L. McCain (#0329095)
7300 Metro Boulevard, Suite 500
Minneapolis, MN 55439
(952) 896-1700

ATTORNEYS FOR PLAINTIFF
MIDWEST PIPE INSULATION, INC.

ACKNOWLEDGEMENT

The undersigned hereby acknowledges that costs, disbursements, and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. § 549.211, Subd. 1, to the party or parties against whom the allegations in this pleading are asserted.

s/ Alec J. Beck

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT
Case Type 14: Other Civil

Midwest Pipe Insulation, Inc., d/b/a MPI, Inc.
Plaintiff,

Case File No: _____

v.

ANSWER OF DEFENDANT PIPEFITTERS LOCAL UNION NO. 539

MD Mechanical, Inc., a Minnesota corporation, and Minneapolis Pipefitters Union, Local 539,
Defendants.

Defendant Pipe Fitters Local Union No. 539 ("Local 539"), for its Answer to Plaintiff's Complaint, states as follows:

GENERAL DENIAL

Local 539 denies every allegation except as specifically admitted or qualified herein.

1. Local 539 lacks sufficient information at this time to admit or deny the allegations in paragraph 1 of the Complaint.
2. Local 539 admits the allegations in paragraph 2 of the Complaint, with the qualification that MD also is engaged in the business of pipe fitting work.
3. Local 539 admits the allegations in paragraph 3 of the Complaint, and affirmatively states that it is an unincorporated labor organization within

the meaning of the Labor Management Relations Act, 29 U.S.C. §§ 142(3) and 152(5). Local 539 represents pipe fitters for purposes of collective bargaining with their employers. At all relevant times Local 539 has been party to a collective bargaining agreement with MD which, among other things, defines the trade or work jurisdiction of Local 539.

4. Local 539 denies the allegations in paragraph 4 of the Complaint because all of Plaintiff's claims are preempted by federal labor law and this matter is within the exclusive jurisdiction of the National Labor Relations Board.

5. Local 539 denies the allegations in paragraph 5 of the Complaint because all of Plaintiff's claims are preempted by federal labor law and this matter is within the exclusive jurisdiction of the National Labor Relations Board.

6. Local 539 admits the allegations in paragraph 6 of the Complaint. Local 539 specifically states that the Project was not covered by the federal Davis-Bacon Act or the Minnesota Prevailing Wage Act.

7. Local 539 lacks sufficient information at this time to admit or deny the allegations in paragraph 7 of the Complaint.

8. As to the allegations in paragraph 8 of the Complaint, Local 539 admits that it has agreed to provide a grant from its market recovery program ("MRP") to MD for the Project pursuant to the terms of a document

entitled "Local 539 Market Recovery Contract Agreement." Local 539 denies the allegations characterizing the purpose of its MRP. Local 539 specifically states that the operation of its MRP is protected activity under section 7 of the National Labor Relations Act, 29 U.S.C. § 157.

9. Local 539 denies the allegations in paragraph 9 of the Complaint characterizing the design and purpose of its MRP. Local 539 specifically states that the operation of its MRP is protected activity under section 7 of the National Labor Relations Act, 29 U.S.C. § 157.

10. Local 539 denies the allegations in paragraph 10 of the Complaint characterizing the operations of its MRP. Local 539 specifically states that the operation of its MRP is protected activity under section 7 of the National Labor Relations Act, 29 U.S.C. § 157.

11. Local 539 denies the allegations in paragraph 11 of the Complaint.

12. Local 539 denies the allegations in paragraph 12 of the Complaint.

13. Local 539 lacks sufficient information at this time to admit or deny the allegations in paragraph 13 of the Complaint.

14. Local 539 lacks sufficient information at this time to admit or deny the allegations in paragraph 14 of the Complaint.

15. Local 539 lacks sufficient information to admit or deny the allegation in paragraph 15 of the Complaint that Michael Bruin

contacted MPI's office manager, Kay Harmdierks, on or about July 11, 2006. Local 539 denies the remaining allegations in paragraph 15. Local 539 specifically denies that Local 539 threatened to rescind an MRP grant if non-union laborers were used to perform the subcontract insulation work or for any other reason.

16. Local 539 denies the allegation in paragraph 16 that it threatened to rescind an MRP grant to MD. Local 539 lacks sufficient information at this time to admit or deny the allegation in paragraph 16 of the Complaint that on or about July 11, 2006, MD sent a letter terminating the June 26, 2006 subcontract agreement with MPI.
17. Local 539 denies the allegations in paragraph 17 of the Complaint.
18. With respect to the restated allegations in paragraph 18 of the Complaint, refer to the responses previously articulated to each allegation.
19. Local 539 lacks sufficient information at this time to admit or deny the allegation in paragraph 19 of the Complaint.
20. As to the allegations of paragraph 20 of the Complaint, Local 539 denies that it had knowledge of the existing business and contractual relationship between MPI and MD.
21. Local 539 lacks sufficient information at this time to admit or deny the allegations in paragraph 21 of the Complaint
22. Local 539 denies the allegations in

paragraph 22 of the Complaint.

23. Local 539 denies the allegations in paragraph 23 of the Complaint.

24. Local 539 denies the allegations in paragraph 24 of the Complaint

25. Local 539 denies the allegations in paragraph 25 of the Complaint.

26. Local 539 denies the allegations in paragraph 26 of the Complaint.

27. With respect to the restated allegations in paragraph 27 of the Complaint, refer to the responses previously articulated to each allegation.

28. As to the allegations in paragraph 28 of the Complaint, Local 539 states that the statute speaks for itself.

29. As to the allegations in paragraph 29 of the Complaint, Local 539 states that the statute speaks for itself

30. Local 539 denies the allegations in paragraph 30 of the Complaint.

31. Local 539 denies the allegations in paragraph 31 of the Complaint.

32. With respect to the restated allegations in paragraph 32 of the Complaint, refer to the responses previously articulated to each allegation.

33. Local 539 denies the allegations in paragraph 33 of the Complaint.

AFFIRMATIVE DEFENSES

1. Plaintiff's Complaint fails to state a claim upon which relief may be granted.

2. Plaintiff's Complaint must be dismissed because all of Plaintiff's claims are preempted by federal labor law including the Garmon preemption doctrine and preemption under § 301 of the Labor Management Relations Act.
3. Plaintiff's Complaint must be dismissed for lack of jurisdiction because all of Plaintiff's claims are within the exclusive jurisdiction of the National Labor Relations Board.
4. Plaintiff lacks standing to pursue claims under the Minnesota Prevailing Wage Act.
5. Plaintiff lacks standing to pursue its purported "unfair competition" and "tortious interference" claims against Local 539.
6. As a separate alternative defense to the Complaint, Local 539 alleges that the claims contained in the Complaint may be barred by any or all of the affirmative defenses referenced in Rule 8.03 of the Minnesota Rules of Civil Procedure. To the extent that Plaintiff's claims may be barred by one or more of said affirmative defenses not specifically set out above and cannot be determined until Local 539 has had an opportunity to complete discovery, Local 539 incorporates all affirmative defenses as are fully set forth therein.

WHEREFORE, Defendant Local 539 respectfully requests that Plaintiff's Complaint be dismissed in its entirety and with prejudice, that judgment be entered for Defendant Local 539, that Defendant Local 539 be awarded costs, disbursements, and attorney's fees herein, and such other and further relief as may be just

and equitable.

Dated: May 29, 2007

MILLER•O'BRIEN

s/ Brendan D. Cummins
Brendan D. Cummins (#276236)
Danielle LeClair (#0387482)
One Financial Plaza, Suite 2400
120 South Sixth Street
Minneapolis, MN 55402
(612) 333-5831

ATTORNEYS FOR DEFENDANT PIPE FITTERS LOCAL 539

ACKNOWLEDGMENT REQUIRED BY MINN. STAT. § 549.211, SUBD. 1

The undersigned hereby acknowledges that an appropriate sanction may be imposed pursuant to Minn. Stat. § 549.211, subd. 3 against the party submitting this pleading.

Dated: May 29, 2007.

By: s/ Brendan D. Cummins
Brendan D. Cummins (#276236)

ATTORNEY FOR DEFENDANT PIPE FITTERS LOCAL 539

Supreme Court, U.S.
FILED
JAN 26 2010
OFFICE OF THE CLERK

No. 09-754

In the Supreme Court of the United States

MIDWEST PIPE INSULATION, INC.,
Petitioner,

vs.

MINNEAPOLIS PIPEFITTERS UNION, LOCAL 539,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a state-law tort claim is preempted under the *Garmon* doctrine if it is premised on alleged conduct that is actually or arguably prohibited by the National Labor Relations Act?

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STATEMENT OF THE CASE

In this case the unanimous Minnesota Supreme Court applied the *Garmon* preemption doctrine to dismiss a state-law tort claim that on its face alleges conduct arguably prohibited by the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(b)(4)(ii)(B). This was a straightforward application of long-established law.

As this case was decided on a motion for judgment on the pleadings, the relevant fact allegations are contained in the Complaint of Petitioner Midwest Pipe Insulation, Inc., d/b/a MPI, Inc., ("MPI") (Pet. App. 49-57.) The central allegation in the Complaint is that Respondent Minneapolis Pipefitters Union, Local 539 ("Local 539" or "the Union") purportedly threatened to withdraw a grant of money from its market recovery program to a unionized pipefitting contractor to force that contractor to breach its subcontract with Petitioner for insulation work on a school construction project. (Pet. App. 52.) The Minnesota Supreme Court ruled that this alleged conduct arguably constitutes secondary boycott activity that is prohibited by the NLRA, 29 U.S.C. § 158(b)(4)(ii)(B), and thus the lawsuit is preempted under *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). (Pet. App. 21-29.)

Local 539's market recovery program offers grants of funds to contractors on certain construction projects for purposes of organizing and increasing job opportunities for Local 539's members. (Pet. App. 22-23, 50-51.) As a condition of receiving funds from the program, the contractor must agree to be or become

signatory to Local 539's collective bargaining agreement and that all covered pipefitter work on the project will be performed by pipefitters dispatched from Local 539. (*Id.*) MPI alleges that the market recovery program is funded, in whole or in part, by dues deductions from employees' wages and that some of these dues are deducted on federal and state prevailing wage projects. (Pet. App. 51.) On about June 8, 2006, Local 539 agreed to provide a market recovery grant of $80,000 to unionized pipefitting contractor MD Mechanical, Inc. ("MD") relating to pipefitting work on the St. Michael-Albertville Elementary School Construction Project ("the Project"). (Pet. App. 24, 50.) The Project was *not* covered by the Federal Davis-Bacon Act, 40 U.S.C. §§ 3141-48, or the Minnesota Prevailing Wage Act, Minn. Stat. §§ 177.41 *et seq.* (Pet. App. 23, 59.)

On about June 8, 2006, MPI submitted a bid to MD to perform insulation work on the Project. (Pet. App. 52.) On about June 26, 2006, MD accepted MPI's bid of $166,800, and sent MPI a standard subcontract agreement signed by the president of MD. (*Id.*) On about July 11, 2006, MD's president allegedly contacted MPI and stated that Local 539 had "threatened" to rescind the grant of money from its market recovery program to "force" MPI to breach its subcontract and "hire a union signatory contractor to replace MPI." (*Id.*) On about July 11, 2006, MD allegedly sent a letter to MPI terminating and breaching the subcontract agreement with MPI "as a result of Local 539's threat." (*Id.*) Local 539 vigorously denies these allegations. (Pet. App. 60-61.) Local 539 does not even represent insulators and its

collective bargaining agreement does not cover insulation work. (Pet. App. 59.)

On May 10, 2007, MPI commenced this lawsuit in Hennepin County District Court against Respondent Local 539 and Defendant MD Mechanical, Inc. (Pet. App. 49-57.) The Complaint asserted claims of tortious interference with contract, unfair competition, and violation of the Minnesota Prevailing Wage Act. (Pet. App. 52-55.) On May 29, 2007, Local 539 served its Answer to the Complaint. (Pet. App. 58-64.)

Local 539 filed a motion for judgment on the pleadings pursuant to Minn. R. Civ. P. 12.03. (Pet. App. 1-7.) After receiving Local 539's brief, MPI voluntarily dismissed its prevailing wage claim, voluntarily dismissed MD from the case, and conceded that its unfair competition claim merely duplicated its tortious interference claim. (Pet. App. 4.) On August 23, 2007, the District Court granted Local 539's motion for judgment on the pleadings, ruling that MPI's state-law tortious interference claim was preempted under *Garmon*. (Pet. App. 1-7.) On August 26, 2008, the Court of Appeals reversed the District Court's decision and ruled that MPI's tortious interference claim was not preempted under *Garmon*. (Pet. App. 8-20.)

On August 29, 2008, Local 539 filed a charge with the National Labor Relations Board ("NLRB") alleging that this lawsuit unlawfully interfered with rights protected by the NLRA. (Pet. App. 30-39.) The NLRB's General Counsel recommended dismissal of the charge, but found that "the lawsuit's focus on conduct actually *prohibited* by the Act renders it

preempted under *Garmon*." (Pet. App. 36.) (emphasis added).

On August 6, 2009, the Minnesota Supreme Court reversed the decision of the Court of Appeals. (Pet. App. 21-29.) The Court dismissed the state-law tort claim under the *Garmon* doctrine because the lawsuit involved alleged conduct that arguably constituted secondary boycott activity prohibited by the NLRA. (Pet. App. 26-29.) Judgment was entered and filed on September 28, 2009. (Pet. App. 40-41.)

REASONS FOR DENYING THE PETITION

This case involves a straightforward application of the well established *Garmon* preemption doctrine by a unanimous Minnesota Supreme Court. Under *Garmon* the United States Supreme Court has long held that federal labor law preempts any state-law claim that applies to conduct that is arguably prohibited or arguably protected by the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151, *et seq*. In this case, the state-law tort claim on its face alleges conduct that arguably constitutes secondary boycott activity prohibited by the NLRA, 29 U.S.C. § 158(b)(4)(ii)(B). Accordingly, the Minnesota Supreme Court properly dismissed the case under *Garmon*. In a case, like this one, that involves a straightforward application of longstanding law, no "compelling reasons" exist for review by the United States Supreme Court. *See* Sup. Ct. R. 10.

This case does not involve a split of appellate court authority. It does not involve conflicts in any judicial decisions. It does not involve judicial error of

any kind. It does not involve an important but unsettled question of federal law. *See* Sup. Ct. R. 10. Instead it involves the application of a black-letter labor law precedent to a typical set of alleged facts.

Petitioner argues that the Minnesota Supreme Court decision grants "impunity" to unions that break the law. This is incorrect. According to the Minnesota Supreme Court, all that was required for Petitioner to seek redress in this case was to file a timely charge with the National Labor Relations Board ("NLRB") alleging unlawful secondary activity in violation of section 8(b)(4)(ii)(B) of the NLRA. The Court dismissed the case because it was filed in the wrong forum. A central premise of the decision is that an alternative legal remedy was available to Petitioner, and Petitioner failed to pursue it. The petition for a writ of certiorari should be denied.

I. *GARMON* PREEMPTION IS WELL ESTABLISHED LAW

In *Garmon* the United States Supreme Court ruled: "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield." 359 U.S. at 244. The purpose of *Garmon* preemption is to avoid conflicts between state law and federal labor policy and to defer to the administrative expertise of the National Labor Relations Board ("NLRB").

The *Garmon* Court explained: "[W]hen an activity is arguably subject to § 7 or § 8 of the Act, the

States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Garmon*, 359 U.S. at 245; *see also Farmer, Special Adm'r. v. United Bhd. of Carpenters & Joiners of America, Local 25, et al.*, 430 U.S. 290, 296 (1977) (stating that "[t]o leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress, and requirements imposed by state law."). The Minnesota Supreme Court has long followed *Garmon*. *See, e.g., Hennepin Broadcasting Assocs. v. American Fed'n of Television & Radio Artists*, 223 N.W.2d 391 (Minn. 1974) (cited and relied on at Pet. App. 27-28.)

This Court has explained that conflict between state law and federal labor policy is inevitable if separate state and federal remedial schemes apply to conduct that is arguably prohibited by federal labor law:

> It is by now a commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations. . . . Because "conflict is imminent" whenever "two separate remedies are brought to bear on the same activity," . . . the *Garmon* rule prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act. . . . The rule is designed

> to prevent "conflict in its broadest sense" with the "complex and interrelated federal scheme of law, remedy, and administration," . . . and this Court has recognized that "[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy."

Wisconsin v. Gould, 475 U.S. 282, 286 (1986) (internal citations omitted).

In this case, Petitioner seeks to invoke a state remedial scheme—a court action for tortious interference with contract—where a federal unfair labor practice remedy already exists with the NLRB for alleged unlawful secondary activity in violation of the NLRA.

II. THIS LAWSUIT IS PLAINLY PREEMPTED UNDER *GARMON* BECAUSE, ON ITS FACE, THE ALLEGED CONDUCT FALLS SQUARELY WITHIN THE NLRA'S PROHIBITION ON SECONDARY ACTIVITY.

In applying *Garmon* to dismiss the state-law tort claim, the Minnesota Supreme Court reasoned as follows:

> '[W]hen an activity is arguably subject to § 7 or § 8 of the Act,' state jurisdiction is preempted in favor of the NLRB . . . In this case, MPI alleges that Local 539 threatened to rescind its market recovery program grant in

> order to coerce MD into breaking its contract with MPI. MPI's allegations fall squarely under the [secondary activity] prohibitions outlined in section 8."

(Pet. App. 27-28) (quoting *Garmon*, 359 U.S. at 245.)

The conduct alleged in this case tracks the language of the NLRA's statutory prohibition of secondary activity to a remarkable extent. Section 8(b)(4)(ii)(B) of the NLRA makes it an unfair labor practice to "*threaten*, coerce, or restrain any person engaged in commerce or in an industry affecting commerce...*where...an object thereof is...forcing or requiring any person to cease...doing business with any other person.*" 29 U.S.C. § 158(b)(4)(ii)(B) (emphasis added). Federal labor law thus preempts state law claims that arise from alleged "secondary pressure," i.e., attempts to coerce or force a neutral employer to cease doing business with another employer. *BE & K Constr. Co. v. United Bhd. of Carpenters & Joiners of Am.*, 90 F.3d 1318, 1330 (8th Cir. 1996).

The gravamen of Petitioner's Complaint is a classic allegation of secondary pressure—the use of a "threat" to "force" a neutral employer not to do business with a non-union contractor:

> Local 539 *threatened* to rescind its promised "target money" if MPI's non-union laborers were used to perform the subcontract insulation work for the Project. [A]s a result of Local 539's *threat* to rescind its promised "target money,". . . *MD was forced by Local*

> *539 to hire a union signatory contractor to replace MPI . . .*

(Pet. App. 52-53.) (emphasis added). Thus, Petitioner's Complaint allegations fall squarely within the secondary pressure provisions of the NLRA, and the tortious interference claim is preempted under *Garmon*.

The statutory ban on secondary activity has been explained as follows:

> Section 8(b)(4)(ii)(B) essentially creates two separate requirements for [an NLRB] finding of an unfair labor practice on the part of a union: (1) The challenged union conduct must have as an object *forcing or requiring a neutral business to cease doing business* with another business; and (2) the union must pursue its object by *threatening*, coercing, or restraining the neutral business.

Soft Drink Workers Union Local 812 v. NLRB, 657 F.2d 1252, 1261 (D.C. Cir. 1980) (emphasis added); *see also Carpenters, Local 112*, 217 NLRB 902, 912 (1975). When economic pressure is placed upon a company with the objective of causing that company to cease doing business with the employer with whom the Union has its primary dispute, the pressure is secondary and unlawful.

The question of whether the union pursued a secondary object by "threaten[ing], coerc[ing], or restrain[ing]" the employer goes to the nature and foreseeable consequences of the pressure that the union actually placed on the employer. *Soft Drink*

Workers Union Local 812, 657 F.2d at 1263. Activity with a secondary object is unlawful whether the actual coercive effect is great or relatively small. *See generally NLRB v. Twin City Carpenters District Council*, 422 F.2d 309, 315 (8th Cir. 1970) (finding that picketing of general contractor with sign declaring in part "cabinets being installed on this job were not made by members" of respondent union, was proscribed secondary boycott, notwithstanding that coercive effect may not have been great). In this case, the Union's alleged threat to rescind a monetary grant of $80,000 is arguably a "threat" within the meaning of section 8(b)(4)(ii)(B) because it would have the reasonably foreseeable effect of causing MD to cease doing business with Petitioner. In fact, Petitioner alleges in its Complaint that the alleged threat did in fact "force" MD to breach its contract with Petitioner. (Pet. App. 52.)

Moreover, the alleged threat is clearly secondary in nature. Petitioner has alleged that Local 539 threatened to rescind an $80,000 market recovery grant to "pressure" or "force" MD to cease doing business with Petitioner, a non-union insulation contractor with whom the Union allegedly had its primary dispute. (Pet. App. 52.) Petitioner alleges that the threat was made in order to "pressure" or "force" MD to use a union insulation contractor rather than Petitioner: *"[A]s a result of Local 539's threat . . . MD was forced by Local 539 to hire a union signatory contractor to replace MPI."* (Pet. App. 52.) (emphasis added). This would constitute unlawful secondary pressure.

In this case, the General Counsel's Office of the NLRB issued a legal advice memorandum concurring

with the application of *Garmon* to this lawsuit because the alleged conduct arguably constitutes unlawful secondary pressure. (Pet. App. 35-36.) The General Counsel's Office issues such opinions to the regional offices of the NLRB to address legal questions in pending cases. The General Counsel's Office found that "the Union's alleged tortious conduct was, if substantiated, actually prohibited by the Act because it violated Section 8(b)(4)(ii)(B)." (Pet. App. 35.) As a result, the General Counsel's Office determined that "the lawsuit's focus on conduct actually prohibited by the Act renders it preempted under *Garmon*." (Pet. App. 36.)

III. THE MINNESOTA SUPREME COURT PROPERLY DECLINED TO ADDRESS WHETHER THE ALLEGED CONDUCT WAS *PROTECTED* BY THE NLRA BECAUSE THE CONDUCT WAS ARGUABLY *PROHIBITED* BY THE NLRA SUCH THAT *GARMON* PREEMPTION APPLIES.

Notwithstanding its Complaint allegations, Petitioner attempts to change the subject from "arguably prohibited" conduct and focus on the alternative *Garmon* inquiry—whether the alleged conduct was "arguably protected." The principal issue that Petitioner desires to present to this Court is whether the issuance of a market recovery grant is protected by section 7 of the NLRA, 29 U.S.C. § 157, if the market recovery program allegedly contains dues that were deducted on a federal project in violation of the Davis-Bacon Act, 40 U.S.C. §§ 3141-

48. Thus, Petitioner devotes its entire petition to an issue that the Minnesota Supreme Court considered irrelevant and declined to decide. The Minnesota Supreme Court explained as follows:

> MPI attempts to bypass the section 8 analysis . . . by asserting that because Local 539 violated provisions of the Davis-Bacon Act, Local 539's actions are no longer protected by the NLRA, and therefore preemption no longer applies. But MPI's suit is preempted not because Local 539's actions are protected by the NLRA, in which case illegal activity might be relevant, but rather because Local 539's actions are *prohibited*. Because Local 539's actions, as alleged by MPI, are prohibited by the NLRA under section 8, it is irrelevant whether Local 539 also violated the Davis-Bacon Act and whether that violation would take the market recovery program outside of the ambit of section 7.

(Pet. App. 28-29.) (emphasis in original). In this manner, the Minnesota Supreme Court correctly concluded that there was no need to address the issue of the extent to which market recovery grants are *protected* by federal labor law since the specific conduct in question—the threat to rescind a grant of money to force an employer not to do business with another employer—was arguably *prohibited* by the NLRA and thus preempted under *Garmon*. A writ of certiorari should not be granted to consider a question that the Minnesota Supreme Court properly declined to reach.

Moreover, it should be noted that the applicable case law contradicts Petitioner's argument that market recovery programs are not protected by section 7 of the NLRA. *See Manno Elec., Inc.*, 321 NLRB 278, 298 (1996); *see also Can-Am Plumbing, Inc.*, 335 NLRB 1217 (2001), *rev'd and remanded*, 321 F.3d 145 (D.C. Cir. 2003), *aff'd on reh'g*, 350 NLRB No. 75 (2007); *Associated Builders and Contractors, Inc.*, 331 NLRB No. 5 (2000). The cases Petitioner relies on all pertain to the issue of whether dues deductions earmarked for a market recovery program on federal prevailing wage jobs violate the Davis-Bacon Act. *See, e.g., International Broth. of Elec. Workers, Local 357, AFL-CIO v. Brock*, 68 F.3d 1194 (9th Cir. 1995); *Building & Const. Trades Dep't v. Reich*, 40 F.3d 1275 (D.C. Cir. 1994); *Kingston Constructors*, 332 NLRB 1492 (2000). Research revealed no case, and Petitioner cites no case, finding that the operation of a market recovery program is no longer protected by section 7 of the NLRA simply because it may have received funding from dues on a federal project. Notably, the project in question was not even covered by the federal Davis-Bacon Act or the Minnesota Prevailing Wage Act. (Pet. App. 23, 59.)

Petitioner argues that market recovery programs cannot simultaneously be protected under section 7 and prohibited under section 8(b)(4) of the NLRA. The proper response is that the legality of market recovery programs depends on how they are used. Market recovery programs are protected by section 7 in most instances. *Manno Elec., Inc.*, 321 NLRB at 298. However, where, as alleged here, a union threatens to withdraw a grant of money to

force one contractor not to do business with another contractor, and the union's members do not even perform or seek to perform the work in question, then section 8(b)(4) arguably applies. *See Am. Steel Erectors v. Iron Workers Local 7*, 536 F.3d 68, 84-85 (1st Cir. 2008) (affirming dismissal under *Garmon* of state-law tort claims alleging the use of threats and coercion in the operation of a market recovery program). Because this case involved conduct arguably prohibited by section 8(b)(4) of the NLRA, the Minnesota Supreme Court did not need to reach the issue of the extent to which the market recovery program is protected by section 7 of the NLRA.

In sum, the Minnesota Supreme Court decided this case on the narrowest possible legal basis and thereby avoided entering the public policy debates that Petitioner invites the Court to entertain. Petitioner cites no compelling reason for this Court to consider a question that the Minnesota Supreme Court properly declined to address. No compelling reason exists to grant a writ of certiorari to review a straightforward application of *Garmon* preemption.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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